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No. 09-95

Supreme Court, U.S.
FILED
JUL 22 2009

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In The

Supreme Court of the United States

GRENADA STAMPING and ASSEMBLY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the National Labor Relations Board's case law which requires employers to give reasonable advance notice of an impending poll to the union rational and consistent with the National Labor Relations Act and relevant Supreme Court case law?

2. Is the National Labor Relations Board's decision in the instant case supported by substantial evidence?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are as follows:

Grenada Stamping and Assembly, Inc., f/k/a Grenada Manufacturing Acquisition Corporation, *Petitioner*

National Labor Relations Board, *Respondent*

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, *Intervenor*

RULE 29.6 STATEMENT

Grenada Stamping and Assembly, Inc. is a wholly owned subsidiary of ICE Industries Inc. No publicly held company or companies own more than 10% of Grenada Stamping's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
THIS CASE CALLS FOR AN EXERCISE OF THE COURT'S SUPERVISORY POWERS	7
The NLRB's Case Law Requiring Employers To Give Reasonable Advance Notice Of An Impending Poll To The Union Is Not Rational And Consistent With The NLRA Or Relevant Supreme Court Case Law; Furthermore, The NLRB's Decision Applying This Law In The Instant Case Is Unsupported By Substantial Evidence	7
i. Background: The changing legal context of polling under the NLRA	7
ii. The irrationality of the Board's decision	10

TABLE OF CONTENTS – Continued

Page

iii. Inconsistency with the NLRA & Supreme Court case law 15

iv. Lack of substantial evidence 21

CONCLUSION 22

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit (Apr. 23, 2009) .....App. 1

Decision and Order of the National Labor Relations Board (Dec. 21, 2007) .....App. 12

Decision and Order of the Administrative Law Judge (June 12, 2006).....App. 30

TABLE OF AUTHORITIES

Page

CASES

Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359 (1998) ..... *passim*

American Federation of State, County & Municipal Employees Capital Area Council 26 v. Federal Labor Relations Authority, 395 F.3d 443 (D.C. Cir. 2005) 12

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 11

Boaz Carpet Yarns, 280 NLRB 40 (1986) 10, 12, 13, 22

Carr v. Zaja, 283 U.S. 52 (1931) 6

Celanese Corp., 95 NLRB 664 (1951) 8

DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568 (1988) 20

Edenfield v. Fane, 507 U.S. 761 (1993) 19

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 16

Gilbert v. NLRB, 56 F.3d 1438 (D.C. Cir. 1995) 12

Grenada Stamping, 351 NLRB No. 74 (Dec. 21, 2007) ..... *passim*

Grenada Stamping, Docket No. 08-60368, 2009 U.S. App. LEXIS 8620 (5th Cir. April 23, 2009) 1

Henry Bierce Co. v. NLRB, 23 F.3d 1101 (6th Cir. 1994) 10

Kleindienst v. Mandel, 408 U.S. 753 (1972) 19

TABLE OF AUTHORITIES – Continued

Page

LaShawn A. v. Barry, 87 F.3d 1389 (D.C. Cir. 1996) 12

Levitz Furniture, 333 NLRB 717 (2001) ..... *passim*

NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967) 16

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 20

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) 9, 12

NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) 18, 19

NLRB v. Health Care & Retirement Corporation of America, 511 U.S. 571 (1994) 12

NLRB v. Mullican Lumber & Mfg. Co., 535 F.3d 271 (4th Cir. 2008) 8

NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973) 16

NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941) 18, 19, 20

Struksnes Construction, 165 NLRB 1062 (1967) 4, 5

Texas Petrochemicals, 296 NLRB 1057 (1989), *enforced in part*, 923 F.2d 398 (5th Cir. 1991) 5, 10, 14, 17, 21

Thomas v. Collins, 323 U.S. 516 (1945) 18, 19, 20

Unifirst Corp., 346 NLRB 591 (2006) ... 10, 11, 13, 14, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Villamonte-Marquez, 462 U.S. 579 (1983) 6

Universal Camera v. NLRB, 340 U.S. 474 (1951) 21

Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 19

CONSTITUTION AND STATUTES

U.S. Const. amend. I ..... *passim*

28 U.S.C. § 1254(1) 1, 23

29 U.S.C. § 157 ..... *passim*

29 U.S.C. § 158(a)(1) 2, 18, 20, 21

29 U.S.C. § 158(a)(3) 2

29 U.S.C. § 158(a)(5) 2, 18, 2

29 U.S.C. § 158(c) 3, 15

29 U.S.C. § 159(a) 2, 16

29 U.S.C. § 160(e) 5

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2009 U.S. App. LEXIS 8620, Docket No. 08-60368 (5th Cir. Apr. 23, 2009) (App. 1-11). The opinion of the National Labor Relations Board ("NLRB") is reported at 351 NLRB No. 74 (Dec. 21, 2007). (App. 12-158).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, granting the NLRB's petition for enforcement of its opinion and order, was handed down on April 23, 2009. (App. 1-11). Petitioner Grenada Stamping and Assembly, Inc. ("Grenada Stamping" or petitioner) has ninety (90) days from April 23 to file a petition for a writ of certiorari with the United States Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA" or "the Act") [29 U.S.C. § 157]:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

> engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. § 158(a)(3)].

Section 8(a)(1) of the National Labor Relations Act [29 U.S.C. § 158(a)(1)]:

> (a) Unfair labor practices by employer
>
> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [29 U.S.C. § 157] of this title;

Section 8(a)(5) of the NLRA [29 U.S.C. § 158(a)(5)]:

> (a) Unfair labor practices by employer
>
> It shall be an unfair labor practice for an employer –
>
> [. . .]
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) [29 U.S.C. § 159(a)] of this title.

Section 8(c) of the NLRA [29 U.S.C. § 158(c)]:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

This case presents an important question regarding national labor law and policy. This question concerns the right of and proper procedures for employers to poll their employees regarding their union sympathies under the National Labor Relations Act ("NLRA") pursuant to the Supreme Court's decision in *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998). The Fifth Circuit and the NLRB's opinions and orders entered in this case improperly restrict employer polling in contravention of established precedent, the NLRA

and the U.S. Constitution. For these reasons, the instant petition for writ of certiorari should be granted.

This case has its origin in an employer's poll of its employees conducted on March 24, 2005 at its manufacturing facility in Grenada, Mississippi. This poll confirmed the employer's suspicion that the union lacked majority support of the employer's workforce (67 ballots – "no union"; 46 ballots – "yes union"). (App. 87-89). On the basis of this poll, the employer informed the union that it would no longer bargain with the union or recognize the union as the bargaining representative for its employees. (App. 98). The company also instituted new terms and conditions of employment after the poll. (App. 102).

General Counsel for the NLRB conceded at the outset of trial in this matter that petitioner (and its predecessor entities) possessed, in accordance with the standards set forth in *Allentown Mack*, a good faith reasonable doubt of the union's majority status at the time this poll was conducted. (App. 6-7, 110). Nevertheless, respondent NLRB and intervenor union challenged the poll, alleging that the poll was procedurally deficient according to NLRB precedent. They alleged that petitioner violated the NLRA by failing to comply with the procedural safeguards enunciated in *Struksnes Construction*, 165 NLRB

1062 (1967)[1] and also failed to give reasonable advance notice to the union of the poll as required by *Texas Petrochemicals*, 296 NLRB 1057 (1989), *enforced in part*, 923 F.2d 398 (5th Cir. 1991). Finally, respondent NLRB and intervenor union alleged that, because the poll failed to comply with these procedural safeguards, petitioner unlawfully withdrew recognition from the union. Petitioner contested these allegations at trial before the Administrative Law Judge ("ALJ"), on appeal to the full Board, and resisted an attempt to enforce the Board's order on petition for enforcement to the Fifth Circuit Court of Appeals under Section 10(e) of the NLRA [29 U.S.C. § 160(e)].

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[1] These procedural safeguards require that: (1) The poll be conducted for the purpose of determining the truth of the union's claim of majority support; (2) the purposes of the poll be communicated to the employees; (3) assurances against reprisals be given to the employees; (4) the poll be conducted by secret ballot; and (5) the employer not engage in any unfair labor practices or create a coercive atmosphere. (App. 5 (citing *Struksnes*, 165 NLRB at 1062-63)). In the instant case, the ALJ found that petitioner violated prongs (3), (4) and (5) of the *Struksnes* test. (App. 13-14). However, the Board only affirmed the ALJ's ruling as to prong (4), finding that petitioner failed to poll the employees by secret ballot. *Id.* The Fifth Circuit did not pass on the question of whether petitioner conducted a procedurally valid poll pursuant to *Struksnes*. (App. 6). Instead, the Fifth Circuit affirmed and enforced the Board's order solely on the grounds that petitioner failed to provide reasonable advance notice of the poll to the union as required by *Texas Petrochemicals*. *Id.* Petitioner has asserted at every stage of this litigation that it provided adequate notice to the union under *Texas Petrochemicals*, and that the poll complied with all of the procedural safeguards set forth in *Struksnes* and was thus procedurally valid under existing Board law.

On April 23, 2009, the Fifth Circuit granted the NLRB's petition for enforcement, holding that petitioner failed to give the union reasonable advance notice of the poll pursuant to *Texas Petrochemicals*. (App. 10-11). The Fifth Circuit did not pass on the other issues before the Court of Appeals including whether petitioner properly complied with the *Struksnes* procedural safeguards, or whether the Board's ruling was in keeping with the text of the NLRA or whether the Board's ruling raised significant constitutional questions regarding infringement of the employer's right to free speech under Section 8(c) of the Act and the First Amendment to the U.S. Constitution, even though all of these issues were briefed before the Court of Appeals. (App. 6).

The Fifth Circuit denied petitioner's request to stay and recall the mandate issued in this case pending the filing of a petition for a writ of certiorari on June 22, 2009. On June 29, 2009, petitioner filed in this Court an application to stay and recall the Fifth Circuit's mandate pending the filing of a petition for a writ of certiorari. This application was denied by Justice Scalia on July 2, 2009. This Court has jurisdiction to review the Fifth Circuit's decision despite the fact that its decision and mandate have already issued. *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n. 2 (1983); *Carr v. Zaja*, 283 U.S. 52, 53 (1931).

REASONS FOR GRANTING THE PETITION

THIS CASE CALLS FOR AN EXERCISE OF THE COURT'S SUPERVISORY POWERS.

This case squarely presents novel and important questions of law regarding the legal requirements governing employer polling under the NLRA. Because this case presents important, unresolved questions stemming from previous labor law cases decided by the Supreme Court, including the Court's only case to directly consider the question of employer polling (*Allentown Mack*), the court should grant certiorari in this case.

The NLRB's Case Law Requiring Employers To Give Reasonable Advance Notice Of An Impending Poll To The Union Is Not Rational And Consistent With The NLRA Or Relevant Supreme Court Case Law; Furthermore, The NLRB's Decision Applying This Law In The Instant Case Is Unsupported By Substantial Evidence.

i. Background: The changing legal context of polling under the NLRA.

When the issue of polling first came before the Supreme Court in *Allentown Mack*, the question was posed – was it rational for the Board to apply the same standard to employer polling under the NLRA as it applied to withdrawals of recognition? *Allentown Mack*, 522 U.S. at 363-65 (Scalia, J.). At the time

Allentown Mack was decided, good faith reasonable doubt of a union's majority status was sufficient grounds for an employer to poll its employees or withdraw recognition from a union. *Levitz Furniture*, 333 NLRB 717, 722 (2001) (explaining the legal standard governing withdrawals of recognition at the time *Allentown Mack* was decided). This is no longer the case.

Since *Allentown Mack*, the Board has elevated the standard for lawful withdrawals of recognition. *Levitz Furniture*, 333 NLRB at 725 (overruling *Celanese Corp.*, 95 NLRB 664 (1951)). Now an employer must possess proof of a union's actual loss of majority status at the time recognition is withdrawn from the union. *Id.* Nevertheless, the standard governing polling (good faith reasonable doubt), as clarified by *Allentown Mack*, remains the same. *Id.* at 723 (leaving the good faith doubt standard for polling intact).

As discussed in a recent decision of the Fourth Circuit Court of Appeals, *NLRB v. Mullican Lumber & Mfg. Co.*, 535 F.3d 271, 282-83 (4th Cir. 2008) (emphasis in original), *Levitz Furniture* represents a significant shift in Board policy regarding withdrawals of recognition from analyzing "employer's *beliefs*" (good faith doubt of a union's majority status) to determining "*actual* employee desires" (actual loss of majority support). As a result, the *Levitz Furniture* decision has created powerful incentives for employers to poll their workforce in order to substantiate their good faith doubt of a union's majority status, as suggested by *Allentown Mack*. *Allentown*

Mack, 522 U.S. at 365 (recognizing that employers possessed of good faith doubt of a union's majority status may seek to confirm actual loss of majority support via polling).

Despite this change, the Board continues to apply a body of case law decided prior to *Allentown Mack* and *Levitz Furniture* which severely limits and restricts employer polling. *Allentown Mack*, 522 U.S. at 364-65 (discussing the limitations on polling imposed by *Texas Petrochemicals*). Specifically questioning the validity of the Board's decision in *Texas Petrochemicals*, former Chief Justice Rehnquist opined that it makes little sense for the Board to insist that withdrawals of recognition be premised on evidence regarding actual employee sentiments while other Board decisions strictly limit employers' access to such evidence. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 797 (1990) (Rehnquist, C.J., concurring).[2] While the Supreme Court has questioned the rationality of the Board's case law on polling and its consistency with the NLRA and even the U.S. Constitution,[3] the Court has never examined

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[2] Although Chief Justice's Rehnquist's statement in *Curtin Matheson* concerned the Board's pre-*Allentown Mack* formulation of reasonable good faith doubt of a union's majority status, the reasoning behind his statement applies *a fortiori* to polling conducted with an eye towards assembling evidence to meet the more restrictive standard of *Levitz Furniture*.

[3] *Curtin Matheson*, 494 U.S. at 797 (Rehnquist, C.J., concurring), 799-800 n. 3 (Blackmun, J., dissenting); *Allentown Mack*, 522 U.S. at 380-88 (Rehnquist, C.J., concurring).

this law directly to resolve these questions. The need for Supreme Court review of the Board's case law on polling is particularly acute because the Board's shift in policy on withdrawals of recognition announced in *Levitz Furniture* has created strong incentives for employers to poll their employees.

ii. The irrationality of the Board's decision.

Most directly, this case presents the question of what constitutes reasonable advance notice to the union of an impending poll. For many years, even before *Texas Petrochemicals* was decided, Board case law has imposed such a requirement on employers wishing to poll their employees. *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1109 (6th Cir. 1994) ("the Board has embraced an advance notice requirement since 1982"). However, during this time, the Board has rendered a variety of inconsistent and irreconcilable decisions on this topic. *Grenada Stamping*, 351 NLRB No. 74 (Dec. 21, 2007) (App. 12-158); *Unifirst Corp.*, 346 NLRB 591 (2006); *Boaz Carpet Yarns*, 280 NLRB 40 (1986). As explained below, taken together, these decisions demonstrate that the Board's policy regarding advance notice of polling is irrational.

As a result of its failure to craft a consistent policy or even attempt to explain away discrepancies created by its conflicting decisions on this point, the

Board has created an untenable situation for employers contemplating a poll in which it is impossible for employers to predict how the NLRB will rule when presented with an employer poll. Furthermore, the Board's failure to make clear distinctions on this topic has created substantial risks for employers and employees nationwide. As shown by *Unifirst Corp.* and *Grenada Stamping* and discussed in greater detail *infra*, under the Board's current legal regime governing polling, the question of whether employees will be saddled with a non-majority union which they conclusively rejected in a poll may hinge on details so comparatively inconsequential as a putative distinction between three days' advance notice and a single day's advance notice to the union of a poll. The Fifth Circuit's unpublished decision rendered in this case does not resolve these discrepancies; instead, it heightens the uncertainty facing employers.

The Supreme Court has emphasized the special importance of "reasoned decisionmaking" in the context of federal labor law. To meet this standard, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Allentown Mack*, 522 U.S. at 374. To this end, the Court has stated that it and other federal courts have the duty to review Board case law "for consistency with the Act, and for rationality." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978); *see*

also NLRB v. Health Care & Retirement Corporation of America, 511 U.S. 571, 576 (1994).

> [R]eviewing court[s] also must ask whether the agency's decision is the product of an adequate deliberative process and is consonant with other agency pronouncements in analogous areas. . . . [C]ourts can and should review agency decisionmaking closely to ensure that an agency has adequately explained the bases for its conclusions, that the various components of its policy form an internally consistent whole, and that any apparent contradictions are acknowledged and addressed.

Curtin Matheson, 494 U.S. at 800 (Blackmun, J., dissenting).

As the District of Columbia Circuit Court of Appeals has explained, "reasoned decision-making" of the kind required by *Allentown Mack* requires "treating like cases alike." *American Federation of State, County & Municipal Employees Capital Area Council 26 v. Federal Labor Relations Authority*, 395 F.3d 443, 449 (D.C. Cir. 2005) (quoting *Environmental Action v. FERC*, 996 F.2d 401, 412 (D.C. Cir. 1993)). Treating like cases alike is "the most basic principle of jurisprudence." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*). "It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent." *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995).

The Board has failed to abide by these principles of reasoned decisionmaking. In *Boaz Carpet Yarns*,

the NLRB held that a single day's notice of an impending poll was permissible under the NLRA. *Boaz Carpet Yarns*, 280 NLRB at 45. In *Unifirst Corp.*, a case decided contemporaneously with *Grenada Stamping*, the Board held that three days' advance notice was reasonable. *Unifirst Corp.*, 346 NLRB at 595-96, 606-07. In *Grenada Stamping*, on the other hand, the Board held and the Fifth Circuit affirmed that a single day's advance notice[4] was unreasonable and thus unlawful. (App. 9-11, 126-27)

Notably, *Unifirst Corp.* and *Grenada Stamping* were decided under the same legal framework governing polling and withdrawals of recognition under the NLRA (*i.e.*, both were decided after *Allentown Mack* and *Levitz Furniture*). This fact is significant because both cases reached drastically different conclusions even though they purported to apply the same legal standards to determine the lawfulness of the polls involved. In *Unifirst Corp.*, the

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[4] Splitting the finest of hairs to distinguish *Boaz Carpet Yarns* from the instant case, the Fifth Circuit's decision focuses on the fact that the advance notice provided to the union in the instant case was provided "a mere 18 hours" before the poll was conducted. (App. 8-9). However, there is no effective way to distinguish *Boaz Carpet Yarns* from the instant case on this basis. The *Boaz Carpet Yarns* decision does not mention the precise number of hours of advance notice provided by the employer in that case but only mentions that notice of the poll was provided the day before the poll was conducted. *Boaz Carpet Yarns*, 280 NLRB at 44. On the basis of the *Boaz Carpet Yarns* decision, there is no way to tell for certain whether a full 24 hours' notice (or even 18 hours or more) was provided in that case.

Board took a broadly sympathetic view of the employer's polling of its workforce, holding that the employer's poll was "entirely consistent with the Supreme Court's suggestion in *Allentown Mack* that an employer that *could* lawfully withdraw recognition might want to poll first to secure conclusive evidence that the union in fact lost majority support, as well as to maintain good employee relations, which otherwise might be harmed by an abrupt withdrawal. . . ." *Unifirst Corp.*, 346 NLRB at 595 (emphasis in original). The Board added, "In our view, where, under circumstances such as those present, an employer makes the choice not to continue recognition, and wishes to make sure that withdrawal of recognition would be lawful [under *Levitz Furniture*], that employer may lawfully poll its employees to make sure that the Union in fact no longer enjoys majority status." *Id.* at 595-96. By contrast, the ALJ's opinion in *Grenada Stamping*, adopted by the Board insofar as it concerned the question of adequate notice to the union under *Texas Petrochemicals*, deplored petitioner's poll despite the fact that the Board conceded at the outset of trial that petitioner possessed reasonable good faith doubt of the union's majority status. (App. 6-7, 110). The ALJ's opinion denounced Grenada Stamping's one day's advance notice to the union as "a *blitzkrieg* effort" designed to oust the union. (App. 124-27) (quoting *Texas Petrochemicals*, 923 F.2d 398, 403 (5th Cir. 1991)).

iii. Inconsistency with the NLRA & Supreme Court case law.

The divergent results so evident in the Board's decisions in *Unifirst Corp.* and *Grenada Stamping* can be traced to the Board's lack of a rational and consistent policy under the NLRA towards polling in the wake of *Allentown Mack* and *Levitz Furniture*. At its core, the Board's irrational and contradictory policy stems from inconsistent application and interpretation of the NLRA and Supreme Court case law interpreting the Act. Specifically, the divergent results produced by the Board with regard to polling have their roots in a legislatively unwarranted emphasis on stability in existing bargaining relationships at the price of employee free choice and majority rule. Further, these incompatible results derive from the Board's failure to grapple with the weighty issues presented by polling in light of the plain text of the NLRA and this Court's jurisprudence, which has authoritatively interpreted the NLRA and attempted to reconcile its provisions with generally applicable restraints on the federal government imposed by the First Amendment.

First, the NLRA does not address employer polling. *Allentown Mack*, 522 U.S. at 382 (Rehnquist, C.J., concurring). The Board's authority to regulate polling rests solely on its power to prohibit practices which interfere with, restrain, or coerce employees in exercise of their Section 7 rights. *Id.* The Board cannot show, in keeping with its other applicable precedent or Section 8(c) of the NLRA, that a single day's advance notice to the union of the poll coerced

or restrained any employee in the exercise of his Section 7 rights. Further, the Board has not explained – nor can it explain – how seizing on a single day's advance notice to invalidate an otherwise procedurally valid poll protects the Section 7 rights of petitioner's employees. The immediate effects of the Board's and the Fifth Circuit's decisions invalidating the poll based on inadequate advance notice are to render petitioner's withdrawal of recognition unlawful and to require petitioner to bargain with, and petitioner's employees to be represented by, a union which is demonstrably lacking in majority support. This result is not sanctioned by the Act.

Second, the Board's policy against polling is at odds with the Supreme Court's opinions in *Allentown Mack* and other decisions. The Supreme Court has stated that the Board has a duty to secure industrial peace by promoting stability in collective-bargaining relationships; however, it cannot do so at the cost of impairing the free choice of employees to select their bargaining representative. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987). The Court has also stated that the principle of free choice and majority rule are inherent to the NLRA. *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 279 (1973) ("The right of a free choice is, however, inherent in the principles [of the Act]"); *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) ("The majority-rule concept is today unquestionably at the center of our federal labor policy") (internal citations omitted); *see also* 29 U.S.C. § 159(a) (codifying the principle of majority rule).

In spite of these authorities, the *Texas Petrochemicals* decision does not factor the principles of employee free choice or majority representation into its analysis of polling:

> Under the statutory scheme of bargaining obligations, therefore, there is no compelling need for an employer with doubts concerning the majority status of its employees' selected representative to test the actual extent of support for the representative. Consequently, an employer's interest in testing the actual extent of employee support for an incumbent union is not, in our [the Board's] view, a fundamental interest which outweighs the statutory goal of stability in collective-bargaining relationships.

Texas Petrochemicals, 296 NLRB at 1062. The rationale behind the *Texas Petrochemicals* decision is not only vitiated by *Levitz Furniture*, but it is also fundamentally at odds with the NLRA's general policy because it places the stability of existing bargaining relationships over other fundamental goals of the Act, namely employee free choice and majority rule, in a way which was not intended by Congress. Moreover, the Board's policy on polling actually undermines free choice and majority rule by encouraging employers to continue bargaining with non-majority unions, even though the Board has acknowledged that doing so constitutes an unfair labor practice under Section 8(a)(2) of the NLRA. *Levitz Furniture*, 333 NLRB at 724 n. 46.

Third, the Board's general policy which holds that polling is not protected employer speech under the First Amendment and is not covered by Section 8(c) of the NLRA is dubious at best. Four justices of the Supreme Court have already questioned the correctness of this approach:

> The conclusion that the Board's standard is both irrational and without support in the Act is reinforced by long-standing decisions from this Court. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-617, 23 L. Ed. 2d 547, 89 S. Ct. 1918 (1969), an employer challenged the Board's determination that the employer's communications to its employees attempting to dissuade them from supporting the union violated § 8(a)(5). While upholding the finding of a violation on the facts presented, the Court noted that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8(c), 29 U.S.C. § 158(c), merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1). 395 U.S. at 617. *See also Thomas v. Collins*, 323 U.S. 516, 537, 89 L. Ed. 430, 65 S. Ct. 315 (1945) (union solicitation of employees is protected by First Amendment); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477-478, 86

L. Ed. 348, 62 S. Ct. 344 (1941) (employer's attempts to persuade employees with respect to joining or not joining union are protected by First Amendment). The Court thus concluded that First Amendment rights, codified in § 8(c), limited the Board's regulatory authority to cases where the employer's speech contained a threat of reprisal or coercion.

Under *Gissel's* reasoning, employer solicitation of employee views is protected speech, although such solicitation can constitutionally be prohibited where it amounts to coercion or threats of reprisal. There is no logical basis for a distinction between soliciting views, as in the instant case, and communicating views. Our decisions have concluded that First Amendment protection extends equally to the right to receive information, *Kleindienst v. Mandel*, 408 U.S. 753, 762-763, 33 L. Ed. 2d 683, 92 S. Ct. 2576 (1972), and to the right to solicit information or responses, *Edenfield v. Fane*, 507 U.S. 761, 765-766, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). More specifically, we concluded in *Thomas*, *supra*, at 534, that union solicitation of employee views and support is protected First Amendment activity. In finding union solicitation protected, *Thomas* relied on *Virginia Electric & Power*, *supra*, as establishing that employer's attempts to

> persuade employees were protected First Amendment activity. 323 U.S. at 536-37.
>
> [. . .]
>
> In my view, cases such as *Gissel, supra*, *Thomas, supra*, and *Virginia Elec. & Power Co., supra*, mean that the Board must allow polling where it does not tend to coerce or restrain employees. The Board must decide how and when in the first instance, but its decision must be rational, it must have a basis in the Act, and of course it may not violate the *First Amendment*.

Allentown Mack, 522 U.S. at 386-88 (Rehnquist, C.J., concurring).

Fourth, the Board and the Fifth Circuit have rejected the opportunity to reconsider the Board's jurisprudence on polling in light of the substantial constitutional issues it raises and to develop a more narrowly-tailored construction of the act which does not raise such issues, as required by *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988). As stated by Chief Justice Rehnquist in his concurring opinion in *Allentown Mack*, "It is sufficient that the Board's interpretation of § 8(a)(1) to limit sharply employer polling raises difficult constitutional issues about employers' First Amendment rights. We have held that when an interpretation raises such constitutional concerns, the Board's interpretation of the Act is not entitled to

deference." *Allentown Mack*, 522 U.S. at 387 (Rehnquist, C.J., concurring).

iv. Lack of substantial evidence.

Board orders will not be enforced if they are unsupported by substantial evidence. *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). The Board's order in this case is unsupported by substantial evidence. The record is completely lacking in any evidence showing that petitioner's failure to provide a longer period of advance notice to the union interfered with, restrained or coerced any employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the NLRA.

Additionally, there is no evidence that the union was deprived of its chance to present its case for continued support to the employees prior to the poll in a way which would violate rationale of the *Texas Petrochemicals* decision. The advance notice requirement of *Texas Petrochemicals* is premised on an analogy between polling and Board-supervised representation elections. *Texas Petrochemicals*, 923 F.2d at 403. Because there is a period preceding representation elections in which the employer and the union can present their sides of the issues, the Board and the Fifth Circuit held that, as a matter of fairness, the union should be afforded a similar opportunity prior to a poll. *Id.*

At most, petitioner's failure to give the union a longer period of advance notice of the poll had a *de*

minimis impact on the conduct of the poll. *Boaz Carpet Yarns*, 280 NLRB at 23-24. As in *Boaz Carpet Yarns*, where the union was put on notice of employee dissatisfaction when the employees circulated a decertification petition one month prior to the poll, the union in the instant case was also on notice that support for the union was flagging among petitioner's employees. (App. 62). In fact, union officer Bennie Paige testified at trial before the ALJ that in December of 2004 – three months prior to petitioner's poll – he posted a notice on the union bulletin board calling a meeting to discuss "the future of the union." *Id.* Coincidentally, this notice was one of the first signals petitioner received that the union might lack majority support. *Id.* Because the union had significant advance notice of employee disaffection at the plant it falls squarely within the *de minimis* exception outlined by *Boaz Carpet Yarns*. The Board's decision to invalidate the poll in contravention of *Boaz Carpet Yarns* is unsupported by substantial evidence.

CONCLUSION

Judged under the legal standards outlined above, the NLRB's decision and order in this case is irrational, inconsistent with the NLRA and unsupported by substantial evidence. The Board and the Fifth Circuit's decision and order fail to adequately explain why departure from controlling precedent is appropriate in this case. Because the NLRB's and the Fifth

Circuit's orders "so far [depart] from the accepted and usual course of judicial proceedings" and because the Fifth Circuit has "so far sanctioned" such a departure "from the usual course of proceedings" by the NLRB, this case calls for the exercise of this Court's power of supervisory review. *See* Supreme Court Rule 10; 28 U.S.C. § 1254. Accordingly, the Supreme Court should issue a writ of certiorari in this case to determine these important issues of labor policy and exercise its supervisory authority over how the Board and lower Courts analyze employer polling in the wake of *Allentown Mack* and *Levitz Furniture*.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-60368

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

GRENADA STAMPING AND ASSEMBLY INC.

Respondent

On Petition to Enforce the Orders of the National Labor Relations Board
26-CA-22031, 26-CA-22041, 26-CA-22077

(Filed Apr. 23, 2009)

Before JONES, Chief Judge, and WIENER and BENAVIDES, Circuit Judges.

PER CURIAM:*

The National Labor Relations Board ("NLRB") petitions for enforcement of its order compelling

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Respondent[1] Grenada Stamping and Assembly, Inc. ("Grenada") to bargain with the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union ("the Union") as the presumptive collective bargaining agent of Grenada's employees. The NLRB issued its order after affirming the ruling of the Administrative Law Judge ("ALJ") in a proceeding filed by the Union against Grenada in which the Union complained that the poll of employees conducted by Grenada and a ban by Grenada on discussions about the Union on the plant floor violated Section 8(a)(1) of the National Labor Relations Act (the "Act"). The Union also claimed that Grenada and its predecessors (all respondents before the ALJ) violated Sections 8(a)(1) and 8(a)(5) of the Act by (1) refusing to recognize the Union as the exclusive collective bargaining representative of its employees, to bargain with the Union, and to provide the Union with necessary and relevant information requested by the Union, and (2) improperly making changes to its employees' benefits.

Ruling in favor of the Union, the ALJ concluded that (1) the poll conducted by Grenada to determine whether the Union still enjoyed the support of a majority of the employees was not, as required, conducted by a secret ballot, (2) the poll was conducted in a coercive atmosphere or otherwise as an unfair labor

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[1] 5TH CIR. R. 15.2 denominates Grenada the petitioner for purposes of briefing and oral argument, but we refer to its true party position in the opinion.

practice, (3) adequate assurances against reprisals were not given, and (4) reasonable advance notice of the poll was not furnished to the Union. In this regard, the ALJ ruled – and Grenada cannot and does not seriously challenge – that Grenada was the "perfectly clear successor" to its predecessor, Grenada Manufacturing LLC, from the bankruptcy estate of which Grenada had acquired all assets. The ALJ concluded that Grenada's successor status required it to recognize the Union and to bargain with it.

On appeal, the NLRB addressed only the ALJ's rulings that (1) Grenada was a perfectly clear successor to its predecessor, (2) Grenada failed to give the Union reasonable advance notice of the poll, and (3) Grenada did not conduct the poll by secret ballot. The NLRB did not address other findings and rulings of the ALJ regarding the poll.[2]

After so ruling, the NLRB timely petitioned us for enforcement of its order. Grenada opposes enforcement, and the Union, as intervener, supports it.

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[2] The NLRB affirmed the ALJ's holding that Grenada committed unfair law practices by prohibiting discussion of Union matters on the floor of the plant, refusing to furnish necessary and relevant information requested by the Union, and improperly making changes to employee benefits, none of which rulings are contested here by Grenada.

1. Standard of Review

We review the NLRB's findings of facts for substantial evidence, its conclusions of law *de novo,* and its reasonable construction of labor laws with deference.[3] A factual finding is supported by substantial evidence if there is "more than a scintilla" of evidence supporting it, so that the relevant evidence permits a reasonable mind to accept the NLRB's conclusions.[4] The evidence is reviewed for sufficiency in light of the record as a whole, including any evidence that fairly detracts from the NLRB's findings.[5]

2. Applicable Law

To withdraw recognition of a union, an employer must have actual proof that the union has lost the support of a majority of its employees.[6] One method by which an employer may make this determination is by conducting a poll of its employees after the employer has formed a good-faith doubt about the union's majority status.[7] "Stated another way, an employer that *could* lawfully withdraw recognition

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[3] *Sara Lee Bakery Grp., Inc. v. NLRB,* 514 F.3d 422, 428 (5th Cir. 2008).

[4] *Id.*

[5] *Sanderson Farms, Inc. v. NLRB,* 335 F.3d 445, 448 (5th Cir. 2003).

[6] *Levitz Furniture Co. of the Pac., Inc.,* 333 NLRB 717, 723 (2001).

[7] *Id.* at 717.

[because of objective evidence of the union's loss of majority support] *should* be able to lawfully poll its employees, provided it complies with the procedural safeguards articulated [by the NLRB] in *Struksnes*."[8] Like the Supreme Court,[9] we have recognized that polling is an important tool by which an employer may gauge a union's majority support;[10] polls help companies avoid liability for bargaining with a union that does not in fact enjoy majority support.[11]

The procedural safeguards listed by the NLRB in its *Struksnes* opinion require that: (1) The poll be directed to determining the truth of the union's claim of majority support; (2) the purposes for the poll be communicated to the employees; (3) assurances against reprisals be given to the employees; (4) the poll be conducted by secret ballot; and (5) the employer not engage in any unfair labor practices or create a coercive atmosphere.[12] To the five *Struksnes*

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[8] *Unifirst Corp.*, 346 NLRB 591, 595 (2006).

[9] *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 367 (1998).

[10] *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981), *overruled on other grounds by Allentown Mack*, 522 U.S. at 364.

[11] *S.M.S. Automotive Products*, 282 NLRB 36, 41 (1986).

[12] *Struksnes Constr. Co.*, 165 NLRB 1062, 1062-63 (1967).

safeguards we have added a sixth, *viz.*, that the employer must provide reasonable advance notice to the union of the time and place of the poll.[13]

3. **Analysis**

We decline to address at length the numerous bases given by the ALJ for invalidating Grenada's activities in relation to the Union, and likewise decline to address each of the rulings of the ALJ that the NLRB chose to consider in affirming the ultimate holdings of the ALJ. Rather, in the interest of brevity, we grant the petition of the NLRB for enforcement of its order after considering but one of the reasons it proffered for affirming the ALJ's invalidation of the poll: Grenada's failure to provide reasonable advance notice to the Union of the time and place of the poll, in violation of *Texas Petrochemicals Corp. v. NLRB*.[14] We do so within the indisputable framework that (1) Grenada is, indeed, the perfectly clear successor to Grenada Manufacturing LLC by virtue of Grenada's acquisition of that bankrupt company's business and assets to conduct essentially the same operations using essentially the same work force to perform essentially the same jobs; (2) as conceded by the NLRB's general counsel, Grenada had a good faith basis for polling its employees to ascertain the extent

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[13] *Tex. Petrochem. Corp. v. NLRB*, 923 F.2d 398, 402-03 (5th Cir. 1991).

[14] *Id.*

of their support for the Union; and (3) Grenada had the burden of proving that it complied with the required procedural safeguards for polling, given that polls of union sympathies are presumptively invalid.[15] We conclude that there is substantial evidence in the record to support the conclusion of the ALJ, as affirmed by the NLRB, that Grenada failed to give the Union reasonable advance notice of the poll.

Two weeks after the bankruptcy court approved Grenada's purchase of its predecessor's assets, Grenada polled the employees at the plant. It was not until the afternoon of the previous day, however, that Grenada first notified the Union's representatives, near the end of their shift, that the poll of the employees regarding their support for the Union would commence at 7:00 a.m. the following morning; this, despite the fact that a full week earlier Grenada had retained local attorney Tarik Johnson as the person to supervise the poll. We perceive no viable argument in support of Grenada's contention that its notice to the Union was reasonable. Grenada had informed Johnson of the date and time of the poll six days beforehand, yet did not notify the Union until a scant 18 hours before the poll was scheduled to begin. Even then, notice was not furnished until the afternoon on

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[15] *E.g.*, *Wisc. Porcelain Co., Inc.*, 349 NLRB 151, 151-52 (2007); *see Tex. Petrochem. Corp.*, 923 F.2d at 401-02 (describing the duty of the employer to rebut the presumption of majority status by conducting a poll in accordance with the required procedural safeguards).

the day preceding the next morning's 7:00 a.m. poll, thereby making it virtually impossible for the Union to seek legal guidance, communicate with the employees, or arrange for the presence of observers or third-party administrators before the poll became a fait accompli.

In defense of its claim of reasonable notice, Grenada first offers that the NLRB has reached contradictory results in other cases about the amount of advance notice needed, so this court should remand for an explanation of which line of precedent controls.[16] As we explain below, the instant case is not inconsistent with the cases cited by Grenada, so remand is unnecessary.

In its further efforts to support its contention that it provided reasonable advance notice of the poll, Grenada cites *Unifirst Corp.*, a case in which the union was given only a few days' advance notice of the poll by mail, but employees were informed of the poll at a company-wide meeting several days before the poll was conducted.[17] In *Boaz Carpet Yarns,* which preceded *Texas Petrochemicals,*[18] the NLRB did hold

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[16] *See, e.g., NLRB v. Rolligon Corp.*, 702 F.2d 589, 592 (5th Cir. 1983).

[17] 346 NLRB 591, 606 (2004) (meeting held on August 28; poll conducted on August 31).

[18] It is true, as Grenada points out, that some case law established a requirement of advance notice prior to *Texas Petrochemicals. See, e.g., Hutchinson-Hayes Int'l, Inc.*, 264 NLRB 1300, 1308 (1982), *overruled on other grounds by Laidlaw*

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that one day's notice to a union was sufficient, but there the union had received notice of the employees' dissatisfaction via a petition signed by a majority of employees a full month earlier.[19] Further, the *Boaz* employees received at least three days' advance notice of the poll via a posting in the workplace; here, the notice to employees was not posted until less than twenty-four hours before the commencement of the poll. Finally, the fact that *Texas Petrochemicals* involved absolutely no advance notice is not dispositive. Although no advance notice is obviously not reasonable advance notice, it does not follow that a mere 18 hours notice is reasonable advance notice *per se*.

Waste Sys., Inc., 307 NLRB 1211 (1992); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981), *overruled on other grounds by Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). Nevertheless, *Texas Petrochemicals* was our first clear statement that such an independent requirement exists.

[19] 280 NLRB 40, 45 (1986). Grenada argues that the Union in this case had advance notice that its support was flagging, a finding supported by the concession that Grenada had a good faith doubt about the majority status of the Union. Therefore, Grenada argues, its poll falls within the *Boaz* exception. Nothing as formal as that which has occurred in *Boaz* (where a petition was presented) occurred here. Further, as noted, *Boaz* predates *Texas Petrochemicals;* and the Grenada employees did not receive the several days' advance notice here that they did in *Boaz*. Even if it remains good law, *Boaz* is inapplicable here. To hold otherwise would eviscerate the advance-notice requirement by equating the belief that an employer must hold before conducting a poll with notice to the Union. Logic does not support such a conclusion, and *Allentown Mack* rejected it.

The policy behind advance notice – allowing a union time to have contact with the employees and to disseminate information – was certainly not furthered by the very short time in which to act that Grenada afforded to the Union. Unavailing is Grenada's contention that, because employees could question Grenada's representative who was conducting the poll (Johnson), the Union did not need time to consult with its members and lawyers. Grenada's logic is obviously flawed: Johnson could provide employees information about the polling process, but not about the merits of union representation or the possibly impermissible manner in which the poll was being conducted. Further, as *Texas Petrochemicals* specifically noted, "[a]dvance notice is particularly important when a successor employer seeks to poll its employees shortly after taking over the company and contemplates negotiating with the union."[20]

4. **Conclusion**

We are comfortable in granting the NLRB's petition to enforce its order invalidating the poll for Grenada's failure to satisfy the reasonable-advance-notice requirement expressed in our *Texas Petrochemicals* opinion.[21] Under the discrete facts of this

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[20] *Tex. Petrochem. Corp. v. NLRB*, 923 F.2d 398, 403 (5th Cir. 1991).

[21] *Id.*

case (to which this opinion is limited), Grenada's contention that the time and timing of the first and only notice to the Union of the poll – at mid-afternoon of the day before the 7:00 a.m. commencement of voting – was reasonable, rings hollow. This is particularly so when viewed in the light of Grenada's planning of the event no less than a full week prior to the poll, as evidenced by its retention of Johnson that far in advance as the person to conduct it. There can be no serious question that the notice was not furnished a reasonable time in advance because, *inter alia,* that timing eliminated any chance that the Union might otherwise have had to contact its members or take steps to ensure that the poll would be conducted in compliance with the requirements of *Struksnes* and in such a manner as not to constitute an unfair labor practice.

We grant the petition of the NLRB to enforce all aspects of its order in this action.

PETITION GRANTED.

351 NLRB No. 74

Grenada Stamping and Assembly, Inc., formerly known as Grenada Manufacturing Acquisition Corp. and Grenada Manufacturing, LLC *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union. 26-CA-22031, 26-CA-22041, and 26-CA-22077

December 21, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On June 12, 2006, Administrative Law Judge John H. West issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondents filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and

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[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have

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conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

I. INTRODUCTION

The judge found a poll that the Respondents Grenada Manufacturing, LLC (GML) and Grenada Stamping and Assembly, Inc. (GSA)[3] conducted was unlawful because they failed to comply with the advance notice requirement of *Texas Petrochemical Corp.*, 296 NLRB 1057 (1989), enfd. as modified 923 F.2d 398 (5th Cir. 1991), and the procedural safeguard requirements of *Struksnes Construction Co.*, 165 NLRB 1062 (1967). We affirm this finding.[4] Also,

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carefully examined the record and find no basis for reversing his findings.

[2] We have modified the remedy, Order, and notice to more accurately reflect the violations found.

[3] Prior to March 30, 2005, Grenada Stamping and Assembly, Inc. (GSA) was known as Grenada Manufacturing Acquisition Corporation (GMAC).

[4] In affirming the judge's finding that the poll violated Sec. 8(a)(1), we rely only on the judge's finding that GML and GSA failed to poll GML's employees by secret ballot as required by the Board in *Struksnes*, supra. Because a failure to comply with just one of the *Struksnes* safeguards is sufficient to find a violation of the Act, Member Schaumber and Member Kirsanow find it unnecessary to pass on the judge's additional findings that GML and GSA failed to provide assurances against reprisals and created a coercive atmosphere. See *American National Insurance Co.*, 281 NLRB 713, 713 fn. 3 (1986). Member Walsh finds the poll unlawful for each of the reasons given by the judge.

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for the reasons set out below, we find that GSA became a perfectly clear successor to GML at least as of March 30, 2005.[5] Finally, we adopt the judge's finding that GSA violated Section 8(a)(1) by telling employees Bennie Collins and Lin Paige that they could not discuss the Union at work.

II. FACTS

Respondent Grenada Manufacturing, LLC (GML) started manufacturing stamped metal parts at its Grenada, Mississippi facility in September 1999.

Also, in affirming the judge's finding that the poll was unlawful, we note that the Respondents excepted only to the judge's legal conclusion that the poll was unlawful, not to the judge's factual finding that both Respondents conducted the poll.

[5] It is on this basis that we adopt the judge's finding that GSA violated Sec. 8(a)(5) and (1) by making changes to the terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union an opportunity to bargain and by failing and refusing to furnish the Union with the necessary and relevant information it requested.

Member Walsh expresses no view on his colleagues' finding that GSA became a perfectly clear successor to GML at least as of March 30, 2005. Member Walsh, however, adopts those same 8(a)(5) and (1) violations because he finds, in agreement with the judge, that GSA became a legal successor to GML on about March 4, 2004. Member Walsh, though, finds it unnecessary to pass on the judge's finding that GSA at that time was a "perfectly clear" successor to GML under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). Even if GSA was only an ordinary *Burns* successor, GSA's unilateral action more than a year later clearly cannot be regarded as the permissible setting of "initial" terms and conditions of employment.

When GML began to experience problems performing work to customers' satisfaction, it looked for a company that could provide the expertise required to successfully run GML's business. ICE Industries, Inc. (ICE) was ultimately identified as such a company.

On September 24, 2003, ICE formed Respondent Grenada Manufacturing Acquisition Corporation (GMAC) for the purposes of managing the business of GML and acquiring its assets. On February 21, 2004,[6] GML and GMAC entered into an asset purchase agreement that outlined the conditions under which GMAC would purchase the assets and properties of GML.

On February 23, GMAC and GML entered into a management agreement that gave GMAC certain management rights, including the control of all GML's assets, cash, accounts receivable, furniture, fixtures, and equipment. Under the agreement, GMAC also had the authority to implement and terminate GML's contracts and agreements and to hire and discharge GML's employees. By the terms of the agreement, Gary Houston became general manager of GMAC. Houston possessed the authority to make decisions regarding the Grenada facility, including decisions involving labor relations. Houston and B.J. Anderson, general manager of GML, together handled the day-to-day operations of the Grenada facility.

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[6] All dates hereafter refer to 2004 unless otherwise indicated.

Meanwhile, the Union and GML were parties to a collective-bargaining agreement set to expire on January 31. During negotiations for a new contract, the existing agreement was extended by mutual agreement to March 1.

On March 4, the Union met with Howard Ice, the president of ICE, Chet Melton, the vice president of human resources for GML, and Houston. The meeting resulted in a temporary agreement between the Union and GMAC effective from March 4 until October 31. The agreement stated that GMAC "recognizes there is a union present" and that "[a]ll pay scales, [and] benefits, will remain as are currently practiced, including but not limited to: Hourly wage rates, Medical Insurance, Holidays, Bereavement, Overtime pay, Life/AD&D Insurance, Safety Glasses, and Vision." The agreement also stated that GMAC "will not recognize the work rules, seniority, or classifications in the Grenada Manufacturing, LLC contract" or the existing pension plan and that "all employees must fill out applications and be interviewed for potential hiring at" GMAC. Finally, the agreement stated that GMAC "will negotiate a contract with current union representatives after completion of the Purchase Agreement."[7]

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[7] The Respondents note that, during the March 4 meeting, they informed the Union that employees would have to "apply for jobs under the new GMAC [GSA]." They do not assert that they informed the Union during the March 4 meeting that GSA intended to unilaterally set new terms and conditions of em-

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On April 5, GML filed a voluntary petition for relief under chapter 11 of the bankruptcy code. GMAC continued to manage GML's operations under the management agreement.

In September, the Union and GMAC agreed to eliminate a contractual employee incentive program regarded as unfair by GMAC because it did not benefit most employees. In lieu of the incentive program, the parties agreed to increase the contractual base wage rate and shift premiums. On October 22, the Union and GMAC agreed to extend the March 4 temporary agreement and September supplement to January 31, 2005.

On January 24, 2005,[8] the Union met with Anderson and Melton to discuss further extending the March 4 temporary agreement and September supplement. The Union and GML ultimately agreed to extend the temporary agreement until February 23. Around February 24 or 25, the Union sought an additional extension of the temporary agreement and supplement. Anderson refused the request. On March 10, the bankruptcy judge authorized the sale of GML's assets to GMAC with the transfer of assets effective as of the date the parties closed the sale.

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ployment when (and if) it became the employer, or that the terms of the March 4 temporary agreement itself are evidence that this was done.

[8] All dates hereafter refer to 2005 unless otherwise indicated.

On March 24, the Respondents polled the unit employees to determine if they still wanted the Union to represent them. That same day, the Union faxed GMAC a letter requesting recognition and bargaining. Melton responded by letter dated March 30, stating that GMAC would not recognize the Union based on the results of the poll.

Also on March 30, the sale of GML's assets to GMAC was completed and, as noted, GMAC changed its name to GSA. Some time before the sale was completed, Houston told employees that they would have to fill out new applications based on new ownership.[9] On March 30 or 31, Houston had another meeting with employees and told them that everyone was going to be hired.

Between April 1 and June, GSA conducted employee meetings to inform employees of changes that GSA intended to make concerning their terms and conditions of employment. Also, shortly after April 1, Melton posted a copy of the new personnel policies and procedures on the facility's bulletin board.

On April 7, GSA informed unit employees of a new 401(k) plan. On April 14, GSA told unit employees about certain health benefits changes. On April 19, GSA announced the creation of a voluntary retirement plan. About the same time, GSA advised

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[9] There is, however, no evidence that any employee actually filled out an application.

employees of a change in their vacation year from fiscal year to calendar year. GSA also changed vacation pay rates and discontinued the contractual grievance procedure. Finally, on or around April 24, GSA removed the Union bulletin board.

III. ANALYSIS

The Respondents admit in their answer to the complaint that GSA became a successor to GML on March 30, 2005. In *NLRB v. Burns International Security Services,* 406 U.S. 272 (1972), the Supreme Court stated that although a successor employer "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294. As further explicated by the Board, the "perfectly clear" exception to the general rule that a successor employer is free to set initial terms, while restrictive, should apply "to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.,* 209 NLRB

194, 195 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975); see also *Cadillac Asphalt Paving Co.*, 349 NLRB No. 5, slip op. at 5 (2006). As explained below, we find that GSA became a perfectly clear successor to GML at least as of March 30, 2005.

GSA clearly invited GML's employees to accept employment and informed them of its intent to hire them during employee meetings on March 30 or 31. Contrary to the Respondents, there was no announcement at this time that GSA intended to establish unilaterally new terms and conditions of employment. There was no such announcement during any of GSA's dealings with the Union prior to March 31. Nor did GSA announce any changes, or plans to implement changes, during its meetings with employees prior to March 31.[10] Specifically, there is no evidence that GSA made any such announcement during or before the meetings at which employees were told they were all going to be hired, that it intended to invoke its right to unilaterally establish terms and conditions of employment. Contrary to the Respondents, there was never a "clear announcement" that GSA intended to establish unilaterally new terms and conditions of employment before it hired the GML employees. *Hilton's Environmental, Inc.*, 320 NLRB

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[10] The Respondents do not even clearly argue to the contrary on brief. Instead, they assert that Houston met with employees to announce new terms "around the same time in March" that the transfer of assets was completed (March 30), and that the new terms were posted "on or about April 1."

437, 438 (1995); see also *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988). Thus, this is not a case where the employees' continued employment was contingent on their acceptance of a successor's unilateral changes to their employment terms. *Road & Rail Services*, 348 NLRB No. 77, slip op. at 3 (2006). By its actions, GSA made it "perfectly clear" that it intended to retain "all of the employees in the unit." *NLRB v. Burns International Security Services,* supra. And indeed, all of GML's employees were retained by GSA. While not determinative, this fact further supports our finding of perfectly clear successorship. *Road & Rail Services*, supra, slip op. at 3 fn. 13. GSA did subsequently announce its intent to establish a new set of terms and conditions, but only *after* April 1. By then, it already had informed GML's current workforce that they would be retained, without either making or announcing any changes to unit employees' terms and conditions of employment.

Accordingly, for these reasons, we find that GSA was a perfectly clear successor to GML at least as of March 30, 2005.[11]

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[11] Because the alleged unilateral changes made by GSA to the terms and conditions of employment of unit employees occurred after March 30, 2005, we find it unnecessary to pass on the judge's finding that GSA (then named GMAC) became a perfectly clear successor to GML on March 4, 2004. As noted, above, Member Walsh finds that GSA became a legal successor to GML in March 2004.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law 4, 5, 6(a) and (b), and 7(a).

"4. Since about September 1999 until about March 29, 2005, based on Section 9(a) of the Act, the Union had been the designated exclusive collective-bargaining representative of the Unit employed by Respondent Grenada Manufacturing, LLC.

"5. At all times since about March 30, 2005, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Unit employed by Respondent Grenada Stamping and Assembly, Inc.

"6. (a) Conducting a poll among Respondent Grenada Manufacturing, LLC's employees on March 24, 2005 concerning their union sympathies.

(b) Respondent Grenada Stamping and Assembly, Inc. telling employees on two occasions on about April 21, 2005 that they could not discuss the Union at work.

"7 (a). By conducting a poll among Respondent Grenada Manufacturing, LLC's employees on March 24, 2005 concerning whether they desired to be represented by the Union without giving reasonable advance notice to the Union of the time and place of the poll."

AMENDED REMEDY

Having found that the Respondent Grenada Stamping and Assembly, Inc. has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit and, if requested by the Union, to rescind any unilateral changes in wages, benefits, and conditions of employment implemented in April 2005, and thereafter. We shall order the Respondent to make whole the unit employees for loss of wages or other benefits they suffered as a result of the Respondent's unilateral changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to their health benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn.2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

Respondent Grenada Stamping and Assembly, Inc., Grenada, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively polling its employees concerning their support for the Union.

(b) Refusing to bargain with the Union as the exclusive bargaining representative of its unit employees by failing to provide the Union with reasonable advance notice of the time and place of a poll of unit employees taken for the purpose of determining their desire for continued representation by the Union and conducting unlawful polls for such purposes.

(c) Telling employees that they cannot discuss the Union at work.

(d) Failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of its unit employees.

(e) Unilaterally changing the terms and conditions of employment of its unit employees without first bargaining with the Union.

(f) Failing and refusing to furnish the Union with the necessary and relevant information the Union requested.

(g) In any like or related manner interfering with, restraining, or coercing employees in the

exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All production and maintenance employees employed by Respondent Grenada Manufacturing, LLC and later by Respondent Grenada Stamping and Assembly, Inc. at Respondent's Grenada, Mississippi facility, but excluding sales, purchasing, personnel department, office clerical and professional employees, guards and supervisors as defined in the Act.

(b) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented in April 2005 and thereafter.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes in the manner set forth in the remedy section of this decision.

(d) Furnish the necessary and relevant information requested by the Union on or about March 24, 2005.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Grenada, Mississippi, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of

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[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board".

the notice to all current employees and former employees employed by the Respondent at any time since March 24, 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 2007

Peter C. Schaumber,	Member
Peter N. Kirsanow,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage on any of these protected activities.

WE WILL NOT coercively poll you concerning your support for the Union.

WE WILL NOT refuse to bargain with the Union as the exclusive bargaining representative of our unit employees by failing to provide the Union with reasonable advance notice of the time and place of polls of unit employees taken for the purpose of determining their desire for continued representation by the Union and conduct unlawful polls for such purposes.

WE WILL NOT tell you not to discuss the Union while at work.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive bargaining representative of our unit employees.

WE WILL NOT unilaterally change the terms and conditions of employment of unit employees, without first bargaining with the Union.

WE WILL NOT fail and refuse to furnish the Union with necessary and relevant information the Union requested.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All production and maintenance employees employed by Respondent Grenada Manufacturing, LLC and later by Respondent Grenada Stamping and Assembly, Inc. at Respondent's Grenada, Mississippi facility, but excluding sales, purchasing, personnel department, office clerical and professional employees, guards and supervisors as defined in the Act.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented in April 2005 and thereafter.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes.

WE WILL furnish the necessary and relevant information requested by the Union on or about March 24, 2005.

GRENADA STAMPING AND ASSEMBLY, INC.

William F. LeMaster, Esq. and *Linda M. Mohns, Esq.*, for the General Counsel.

Kenneth E. Milam, Esq. and *R. Reid McKee, Esq. (Watkins & Eager PLLC)*, of Jackson, Mississippi, for the Respondents.

Roger K. Doolittle, Esq. (Doolittle and Doolittle), of Jackson, Mississippi, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Grenada, Mississippi, on December 12, 13, and 14, 2005.[1] Charges and amended charges were filed collectively between March 24 and September 7 by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union (the Union)[2] collectively against Grenada Manufacturing Acquisition Corp. (GMAC), Grenada Stamping and Assembly, Inc. (GSA), and Grenada Manufacturing, LLC (GML) (Respondents). A consolidated complaint was issued on September 26 alleging that Respondents (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating Respondents' employees about their union sympathies, by conducting a poll, and by telling employees that they could not discuss

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[1] All dates are in 2005, unless otherwise indicated.

[2] At the time the Charging Party's name was United Steelworkers of America, AFL-CIO, CLC.

the Union at work; (2) violated Section 8(a)(1) and (5) of the Act by interrogating Respondents' employees about their union sympathies by conducting a poll, by refusing the Union's request to recognize it as the exclusive collective-bargaining representative of the involved unit of employees[3] and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit, by failing and refusing to furnish the Union with necessary and relevant information the Union requested, and by, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondents with respect to this conduct and the effects of this conduct, making the following changes in the terms and conditions of employment for its unit employees, namely (a) changing health benefits; (b) implementing a 401(k) plan; (c) implementing a retirement incentive plan; (d) removing the Union's bulletin board from Respondents' facility; (e) changing the vacation year from a fiscal year beginning June 1 of each year to a calendar year; (f) changing employee vacation pay rates; and (g) continuing to maintain an open door

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[3] The complaint alleges that the following employees of Respondents constitute a unit appropriate for purposes of collective bargaining within the meaning of the Sec. 9(b) of the Act:

> All production and maintenance employees employed by Respondents at Respondents' Grenada, Mississippi facility, but excluding sales, purchasing, personnel department, office clerical and professional employees, guards and supervisors as defined in the Act.

policy but no longer recognizing the grievance procedure.

Respondents deny violating the Act as alleged. Additionally, Respondents argue that (1) all claims against GML are barred by Order of the United States Bankruptcy Court for the Northern District of Mississippi in Case No. 04-12077 dated March 10; (2) Respondent GSA had actual knowledge that the United Steelworkers of America, AFL-CIO-CLC Local 202-A did not in fact represent a majority of its employees, pursuant to *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001); and (3) Respondent GSA had a reasonable doubt, based on objective considerations, of the Union's majority support and lawfully conducted a poll of its employees pursuant to the United States Supreme Court decision in *Allentown Mack Sales & Service, Inc. v. NLRB,* 522 U.S. 359 (1998), and *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel,[4] the Respondents, and the Charging Party, I make the following

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[4] Counsel for the General Counsel's unopposed motion to correct the transcript, dated January 20, 2006, is granted and received in evidence as GC Exh. 43.

FINDINGS OF FACT

I. JURISDICTION

GML, a limited liability company, until March 30, 2005, had been engaged in the operation of a stamped metal parts factory, at its facility in Grenada, where during the calendar year ending December 31, 2004, it (a) sold and shipped products, goods, and materials valued in excess of $50,000 directly to points located outside of the State of Mississippi, and (b) purchased and received products, goods, and materials valued in excess of $50,000 directly from points located outside of the State of Mississippi. At the hearing (Tr. 120 and 121), GSA stipulated that during the 12-month period ending August 31, 2005, in conducting the involved business operations, (a) it sold and shipped from its Grenada facility products, goods, and materials valued in excess of $50,000 directly to points located outside the State of Mississippi, and (b) it purchased and received at its Grenada facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Mississippi. At all material times, each of Respondent Grenada Manufacturing, LLC and Respondent Grenada Stamping and Assembly, Inc. has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

When called by the Respondents, Brannan James Anderson, who at the time he testified at the trial herein was employed by GSA and formerly was a partner in GML, testified that it was his understanding that GML was formed when a group of managers who worked for Textron took the plant private in 1999, forming the company GML when Textron put the involved plant up for sale[5]; that he was hired by GML in September 2002 as vice president of finance; that at the time GML was producing parts for Ford, Collins, and Ackman for Chrysler and GM, and for Frigidaire, a division of Electrolux; that GML had entered into an agreement with Oxford Automotive (Oxford) to produce parts for the Nissan Canton plant which went into their minivan and pickup trucks; that GML secured the financing for the presses to be used to stamp out the Nissan parts; that there were problems in doing the work on the Nissan parts; that he discussed it with Oxford and he tried to find someone in the industry to partner up with to save the plant and the jobs; that ICE Industries showed interest and visited the Grenada plant; that in January 2005 Oxford visited the Grenada plant and advised GML that Oxford was

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[5] As pointed out in General Counsel's Exhibit 14, GML was formed in September 1999 when a group of managers bought the assets of the Grenada Mississippi Textron plant from Textron Automotive Exteriors, Inc. The plant had been in business since the early 1960s.

going to remove the minivan work from GML; that Oxford filed a lawsuit in Federal court to remove the tools (the dies used in the presses) from GML's Grenada plant; that Nissan had approved Oxford moving the dies from GML's Grenada plant; that one of the presses was purchased by GML exclusively for the Nissan program and that 600-ton press was totally worthless at that point if the Nissan work was lost; that two of the partners in GML, Larry Walters – who was the vice president of engineering, and Wayne Taylor – who was the president of GML, opposed GML entering into a Management Agreement with ICE Industries; that Walters and Taylor were removed from their positions and terminated, and he was made general manager of GML; and that GML entered into the Management Agreement with ICE Industries.

Jerry Lumbrezer, who is the director of finance of ICE Industries and is responsible for all the day-to-day operations of all the plants and subsidiaries of ICE Industries, testified that around September 2003 management teams from ICE Industries and GML first met to discuss a possible acquisition; that his boss, Jeff Boger, was doing the "due diligence" on GML to determine if ICE Industries would be interested in a Management Agreement or a purchase of GML; and that due diligence took place from late in the third to fourth quarter of 2003, through 2004, and into 2005 until, as described below, the bankruptcy was settled and the Asset Purchase Agreement was finalized.

GML and the Union had a collective-bargaining agreement which was set to expire on January 31, 2004. During negotiations for a new contract, the existing contract was extended by mutual agreement to March 1, 2004. (GC Exh. 2.)

Lumbrezer testified that in the February-March 2004 timeframe, as indicated above, Oxford, in furtherance of its effort to pull its Nissan tooling from GML's Grenada plant, filed a civil action.[6]

General Counsel's Exhibit 27 is a letter which, as here pertinent, reads as follows:

> Governor Haley Barbour
>
> . . . .
>
> Jackson, Mississippi. . . .
>
> February 5, 2004
>
> . . . .
>
> Ice Industries' goal is to turn Grenada Manufacturing into the South's premier automotive stamping facility. We are committed to and will work diligently towards creating high-skilled, high paying jobs.
>
> Ice Industries has a proven track record in turn-around situations. We have rescued two faltering companies over the past five

[6] As indicated, the tooling would be expensive dies, etc., which are owned by Nissan or Oxford and are loaned to GML by Nissan or Oxford to stamp out the parts for Nissan.

> years, salvaging over 200 jobs. We are confident that our plan for Grenada Manufacturing will experience similar success and that we can grow the facility substantially over the next three years and beyond.
>
> Our immediate primary objective is to secure a long-term relationship with Nissan Automotive. We have the wherewithal to be one of their world-class suppliers.
>
> Thank you for any help you and your staff can offer.
>
> Respectfully,
>
> Howard Ice, Jr.
>
> President
> Ice Industries

Lumbrezer testified that this letter was written because Nissan wanted to pull its tooling out of GML's plant, Ice Industries wanted the opportunity to prove itself to Nissan, and Ice Industries was asking the office of Governor Barbour to work with Nissan.

By letter dated February 13, 2004, on ICE Industries letterhead (GC Exh. 30), Howard Ice advised Doug Rossman, vice president of purchasing of Oxford, as here pertinent, as follows:

> Over the past 5 months we have extensively researched the purchase of Grenada Mfg. As you are well aware, there have been substantial obstacles to overcome in getting

to the point that the acquisition made financial/operational sense.

We now have an operational plan that will put together a world-class stamping company, combined with other Ice Industries resources, to create a smooth running operation for our customers.

Our immediate goal is to stabilize the operations and to begin the turn-around process that we feel will make substantial gains within 2 months. Because we have done this before at our other locations, we are very confident that all customers will see an immediate impact and long-term gains from our management of the company.

We look forward to fixing the relationship that Oxford has had with Grenada, and turn it into a progressive, mutually beneficial partnership.

. . . .

General Counsel's Exhibit 20 is an Asset Acquisition Agreement between GMAC, an Ohio corporation (purchaser), and GML, a Mississippi limited liability company (seller), dated February 21, 2004. As here pertinent, the recitals at the beginning of the agreement read as follows: "Purchaser desires to purchase and Seller desires to sell all of the assets and properties of Business . . . of the Seller on the terms and subject to the conditions contained in this Agreement."

General Counsel's Exhibit 19 is a Management Agreement effective as of "2/23/04" between GML (owner) and GMAC (manager). The recitals at the beginning of the agreement read as follows: "A. Manager owns and operates metal stamping and fabrication facilities. B, Owner desires to contract with Manager to operate Owner's metal stamping and fabrication facilities located in Grenada, Mississippi and any other location where Owner operates (the 'Business')." The Manager's Authority portion of the Agreement reads as follows:

> 3. *Manager's Authority*. Manager shall use its reasonable best efforts to provide administrative, management and supervisory services to Owner to operate the business of Owner. In order to efficiently operate the Business, Manager shall have (subject to the limitations otherwise set forth herein) the following authority:
>
> A. To control all of the assets used or useful in the operation of the Business . . . , including, but not limited to, all cash . . . , marketable securities, notes receivable, accounts receivable, and all furniture, fixtures and equipment.
>
> B. To implement and/or terminate all contracts, agreements and other arrangements of Owner in connection with the Business.
>
> C. To make all purchases and to enter into any contracts or agreements necessary for the operation of the Business.

D. To collect all Revenues of the Business and to have full control over all sales, collections and agreements of the Business.

. . . .

E. From Revenues, to pay all Expenses of the Business, and have full control over all purchases, orders and other expenditures of the Business.

. . . .

F. To provide all management and oversight of Owner's employees who shall be and remain on the payroll of Owner. Manager shall have the right to hire or discharge all employees, on terms and conditions it may deem reasonable.

G. To establish and supervise an accounting system. . . .

H. To receive, consider, and when it deems appropriate, handle the complaints of any customers of the services or the products provided by Owner.

I. To deposit in a banking institution or institutions selected by Owner and in accounts in the name of Owner, all Revenues received by Manager for or on behalf of Owner and to pay from such accounts on behalf of Owner, the Expenses, and to negotiate, endorse and otherwise sign, by and on behalf of the Owner, any and all instruments, checks, draws and other documents.

J. To maintain such policies of insurance against liability . . . and such other policies . . . as are necessary. . . .

K. Except as otherwise set forth herein, in the name of Owner, operate the Business and to make all decisions and commitments and take all actions it deems appropriate in connection therewith.

L. Manager shall perform its duties hereunder in a manner which it believes, in its reasonable discretion, is in the best interests of the Business, and will use the skill and care of a similarly situated commercially reasonably manager. . . .

M. To purchase, rent, and lease and to install or remove equipment or assets . . . [with specified exceptions, namely described presses] for use in the Business.

. . . .

4. *Manager's Compensation.* Manager, as compensation hereunder, shall retain all Revenues less all Expenses; provided that in no event shall such compensation be less than $20,000 in any given month, as averaged over a 24 month period.

. . . .

Lumbrezer testified that part of the reason that the Management Agreement was entered into was that Ice could continue to do due diligence on GML to see if Ice even wanted to purchase it, GML "had run out

of time" (Tr. 111), and GML was "*two weeks from closing the door.*" (Id.) (Emphasis added.)

Chet Melton, the vice president of human resources for GML, gave the following testimony:

> Q. When did you begin working for Grenada Manufacturing Acquisition Corp., which then changed its name to Grenada Stamping?
>
> A. Actually it was a Management Agreement we had, Grenada Manufacturing, LLC had with Grenada Manufacturing Acquisition Corporation, as far as management of the facility. I was still in the capacity of Vice President of Human Resources for Grenada Manufacturing, LLC. [Tr. 227.]

Melton testified that from the time the Management Agreement went into effect through the end of 2004 he was paid by checks of Grenada Manufacturing Acquisition Corporation; and that during that period he worked more just as a manager rather than a vice president and owner.

Gary Houston, who describes himself as a turnaround specialist, testified that he became General Manager with GMAC with the signing of the aforementioned Management Agreement, and he came to Grenada to run GML's facility; that he was never an employee of GML; that he was a consultant while he worked in Grenada, and he was paid by ICE Industries; that it was his job to come to Grenada and determine whether GML could be turned around;

that he was responsible for the turnabout and implementing things that he felt were necessary for the business to survive; that GML had lost one-half of the Nissan business and the other half was in court in that Nissan had filed a lawsuit to pull the rest of the dies out of GML's facility; that GML's largest customer, Electrolux, which is an appliance manufacturer of stoves and refrigerators, among other things, was getting ready to replace one of the jobs that GML was doing and it was going to give GML the new die based on its performance/financial situation; that Electrolux "did not want to continue to do business with us" (Tr. 220); that Ford Motor Company was ready to pull all of its work out of GML; that the first thing he had to concentrate on was to salvage the current customer base; that as general manager of GMAC beginning in February 2004 he signed all of the checks required for the day-to-day operations of the GML facility; that he could write a check up to a certain amount but he did not know what that amount was; that he wrote checks for materials; that he had input regarding labor relations matters and personnel issues; that he solicited input from others but he had final say in making decisions regarding the facility, including management decisions dealing with labor relations matters; that to his knowledge, it was never necessary to amend the Management Agreement that had been executed in late February 2004; that to his knowledge, the relationship between GMAC and GML never changed in any significant respect during the time period that the Management Agreement was in effect from late February 2004

through the end of March 2005; that *without financing from ICE Industries, GML could not have funded all of its operations and met payroll on a timely basis, and it could not have timely filled the orders that had already been placed by its customers;* that he first came to the involved Grenada facility in the latter part of February 2004; that there were two group meetings with employees the first Monday after he arrived in Grenada, and that was the only time; that Anderson introduced him as part of the management group which came to help the manager; that this was after the Management Agreement was signed; that from that date forward he was at the facility more or less day in and day out; that the employees were told at the two aforementioned meetings that he was the new general manager of the facility; that there were no immediate changes in the size of the workforce or the product being produced in late February early March 2004; that Melton was in charge of making sure that GMAC would have a workforce when the sale was finalized; and that Melton continued to work for GML throughout the term of the Management Agreement.

Bennie Paige, who is a department leader of the Company and officer of the Union, testified that Gary Houston was introduced to employees as a group in late February 2004; that after Gary Houston began working at the facility he did not notice any changes in his, Paige's, employment, in his job duties, in the processes or machinery being used, or in the products being manufactured; and that at that time there was

no change in the benefits, and the workforce was not increased of [sic] decreased. On cross-examination, Paige testified that after Gary Houston came on board there were layoffs; and that with respect to one layoff, he filed a grievance and three of the four employees who were laid off were recalled.

Lin Collins, who retired in June 2005 after working at the involved Grenada facility for 33 years, testified that he was a forklift operator and he was the president of Local 202 of the United Steel Workers; that he attended a meeting for all employees in the cafeteria where Gary Houston was introduced by Melton, with Melton indicating the [sic] Houston would be managing the plant; and that after that nothing changed in terms of his day-to-day work life in that he still worked the same shift, doing the same type of work, receiving the same benefits, there was no increase or decrease in the size of the workforce at that time, and to his knowledge, there was no change in the products that were being produced at GML at that time.

When called by the Respondents, Anderson testified that after Gary Houston came to manage the Grenada plant, his, Anderson's, duties at that time were to facilitate the eventual sale of assets; that GML entered into the Management Agreement to get (1) management expertise and the technology that GML did not posses [sic], and (2) assets to be able to run the business as a going concern so it could be sold; that GMAC was not operating the Company; and that GMAC was in effect a banker for GML.

Anderson also gave the following testimony: "*We needed the funds from ICE Industries in order to fund the total operations of Grenada Manufacturing, LLC. We could not have – we were not a going concern, and we could not have paid our bills without their funding.*" (Tr. 373.) (Emphasis added.)

Gary Houston testified that ICE Industries decided that it could no longer go forward with the Asset Purchase and had to go the bankruptcy route when it realized the extent of the possible involved liabilities regarding environmental issues and the under funded pension fund.

When called by Respondents, Anderson testified that ICE Industries began looking at the environmental and pension issues and then it came to their attention that Taylor, unknown to the other GML partners who were there at the time, had entered into a Sales Management Agreement with Retmer Sales in Michigan which claimed that GML owed them in excess of $300,000 for past commissions and would be owed for any future commissions coming on any sales through GML; and that ICE Industries then indicated that it could not go through with the sale unless GML went through bankruptcy to clear up these three points.

In late February 2004 Melton, who as indicated above was GML's vice president of human resources and is GMAC's human resources manager, telephoned Isaac Hardman, who is a staff representative of the Union and who was negotiating with GML for a

new contract, and asked Hardman to meet with him and some other people because GML had a potential buyer for the plant. They agreed to meet on March 4, 2004, at GML's facility in Grenada.

Melton testified that in February and March 2004 there were no significant changes to employees' terms and conditions of employment, and there were no notable changes in the size of the workforce or the product being produced in March 2004.

By application dated March 3, 2004 (GC Exh. 32), GMAC, an Ohio corporation, applied for a Certificate of Authority with the Secretary of State of Mississippi to do business in Mississippi. Lumbrezer testified that the purpose behind the creation of GMAC was to acquire the assets of GML and to manage this business while the bankruptcy and the sale were pending.

Gary Houston testified that General Counsel's Exhibit 33 is an organizational chart for "Grenada Manufacturing"; that the chart is dated "3/04"; that he is listed as general manager on the chart; that B. J. Anderson was affiliated with Grenada Manufacturing, LLC in March 2004 as general manager of Grenada Manufacturing, LLC; that even after he came in as general manager of GMAC, Anderson continued to hold the position of general manager of Grenada Manufacturing, LLC; and that Anderson does not appear anywhere on General Counsel's Exhibit 33.

On March 4, 2004 Hardman, who was accompanied by Collins, Page, and May Bell Topp, met with Melton, Howard Ice, who was the potential new owner, and Gary Houston, who worked for Ice. Hardman testified that Ice indicated that he wanted to purchase GML but (1) he would not purchase the pension program because it was in deficit, and (2) he could not live with the seniority rules which were in place at GML because his factories work on a team concept; that Melton said that *if Ice did not purchase the plant, it would shut down*; and that Ice indicated that (a) he would recognize the Union, (b) as soon as the purchase agreement was finalized he would sit down and negotiate a new contract with the Union, and (c) employees would have to reapply for jobs under the new GMAC. Hardman also testified that General Counsel's Exhibit 3 is an extension agreement entered into on March 4, 2004. It reads as follows:

TEMPORARY AGREEMENT BETWEEN
GRENADA MANUFACTURING
ACQUISITION CORP.
AND
UNITED STEELWORKERS
OF AMERICA LOCAL 202-A

> The Company recognizes there is a union present.
>
> The Company will not recognize the work rules, seniority, or classifications in the Grenada Manufacturing, LLC contract because of the flexibility that is mandated.

All pay scales, benefits, will remain as are currently practiced, including but not limited to:

Hourly wage rates	Overtime pay
Medical Insurance	Life/AD&D Insurance
Holidays	Safety Glasses
Bereavement	Vision

All employees must fill out applications and be interviewed for potential hiring at Grenada Manufacturing Acquisition Corporation.

The Company does not recognize the Hourly-Rated Pension Plan as currently exists with Grenada Manufacturing, LLC.

The Company will negotiate a contract with current union representatives after completion of the Purchase Agreement.

The Company expects all cooperation necessary to achieve success at Grenada Manufacturing Acquisition Corporation.

This agreement will remain in force no later that October 31, 2004.

Agreed on *4th* day of March, 2004 by:

. . . .

The agreement was signed by Hardman, Collins (as president of Local 202-A of the United Steelworkers), Paige, Topp, and Joe Walker for the Union. Under the

column headed "FOR THE COMPANY" Gary Houston signed as general manager of Grenada Mfg. Acquisition, and Melton signed as human resource manager. On cross-examination, Hardman testified that Ice introduced Houston as his employee; that this was the first time he saw Houston and, to his knowledge, Houston was not already working at the involved Grenada plant; that at that time he was not aware of any agreement between GML and Ice as far as the management of the Company was concerned; that at some point Houston came to the involved Grenada facility and began to manage it but he could not remember when; and that he was told by Melton that GML was $2.5 million behind on their pension program, they were trying to get out from under the pension, they wanted the Pension Benefit Guarantee Corp (PBGC) to take over the pensions, they wanted the Union to get on board, and they were not sure that they could "pull that off." (Tr. 48.)

By letter dated March 15, 2004, on ICE Industries' letterhead (GC Exh. 31), Howard Ice advised Rossman, of Oxford that, among other things, a Management Agreement has been signed that gives ICE Industries full management rights to GML; that the Management Agreement can last up to 12 years or up to the execution of the Purchase Agreement; and that ICE Industries removed Taylor and Walters from their management positions with GML and replaced them with a general manager and controller from ICE Industries. General Counsel's Exhibit 21 is a Memorandum of Agreement between GMAC and

GML, dated March 16, 2004, pursuant to which GMAC advanced to GML $200,000 as a deposit for and towards work to be performed by GML for DANA Corporation of Longview, Texas. The agreement specifies that "[s]uch work, including expenses attendant thereto, as is done, performed or advanced by . . . [GML] shall be credited against said $200,000.00." Lumbrezer testified that this was a prepayment to GML, an extension of credit; and that Deerfield Manufacturing, a subsidiary of ICE Industries, was doing work for DANA and it was ICE's intention to move the work to Grenada and subcontract it through GML to have a significant amount of freight savings.

General Counsel's Exhibits 28 and 29 are two letters, both dated March 24, 2004, from Ice to the mayor of Grenada and to the president of the Grenada County Board of Supervisors, respectively. The bodies of the letters are identical, except that, respectively, one refers to help from the city of Grenada and the other refers to help from the Grenada County. They read as follows:

> Grenada Acquisition Corporation, a Subsidiary of Ice Industries, has entered into two agreements with Grenada Manufacturing, LLC. The first agreement is a Management Agreement that gives Grenada Acquisition Corp. full management rights of Grenada Manufacturing. The second agreement is an Asset Purchase Agreement that is executed once all outstanding issues with Grenada Manufacturing are resolved through the Management Agreement. We are hopeful

that we will work through all issues, but no commitments have been made at this time to guarantee the longevity of the Grenada site.

Because some of the issues could seem insurmountable without Local, State, and Federal assistance, Grenada Acquisition corporation will be calling on all facets of government to help resolve the outstanding issues. To briefly discuss our challenges, the list below details some of the issues and whom we will be working with for help:

1. Indemnification from environmental risk: Textron Automotive, Grenada County.

2. Distress termination of under-funded pension: Grenada Mfg. LLC, Federal PBGC.

3. Debt re-structuring and relief: Grenada County, City of Grenada, Local and State Banks.

The attached document outlines our re-quest for help *from Grenada County*. [Emphasis added.] [GC Exh. 29 reads "from the City of Grenada" instead.]

Once all issues are resolved, Grenada Acquisition Corporation will be prepared to execute the Asset Purchase Agreement with Grenada Mfg. LLC. Although some of these issues are difficult, we believe that the long-term potential of the Grenada site is worth the effort. We have a vision for Grenada that positions us as a tiers 1 and 2 automotive stamping and assembly supplier. With the

plant size, capacity, strategic location, and labor resources we feel that this plant could employ 600-700 people within 5 years.

Unfortunately, without substantial help to get all issues resolved to our satisfaction, there is no way to commit to an ongoing operation at Grenada, either through Granada LLC, or Grenada Acquisition Corp. The only viable solution for long-term job retention and growth is to complete the Asset Purchase Agreement with the resolutions in place.

Thank you for your assistance and support of the Grenada facility, I look forward to working with *the County Board* [Emphasis added.] [GC Exh. 29 refers to "the City of Grenada" instead.] more closely over the next few months.

Sincerely,

Howard Ice, Jr.
President
Ice Industries

The attachment to General Counsel's Exhibit 28 requests Grenada County to assist with respect to (1) environmental indemnification, (2) lease payments, (3) property loans/financing, and (4) past due property taxes. The attachment to General Counsel's Exhibit 29 requests the city of Grenada to assist with respect to (1) a 10-year working capital loan of $300,000 at 0-percent interest, and (2) placing on

hold lease payments "[t]hrough May 1, 2004 through December 31, 2005. . . ."

Lumbrezer testified that his responsibilities with GMAC began in the March-April, 2004 timeframe; that as indicated by General Counsel's Exhibit 15, which is an ICE Industries organizational chart, he is the controller of Grenada Acquisition Corporation, which is a subsidiary of ICE Industries; that Grenada Acquisition Corporation and GMAC is the same entity; that he was not an employee of, on the payroll of, or affiliated with GML; that two of the subsidiaries of ICE Industries, namely Acklin Stamping Company and Deerfield Manufacturing basically service automotive or refrigeration and aerospace markets; that since February 2004 ICE Industries exercised full managerial control over GML; that GMAC was created to acquire the assets of GML and to manage this business while the bankruptcy and ultimate sale was pending; that the Management Agreement, which was not amended, was in effect from February 2004 through March 2005; and that the relationship between ICE Industries, GMAC, and GML basically remained unchanged from February 2004 through March 2005.

General Counsel's Exhibit 22 is an April 5, 2004 Interim Order of David W. Houston III, United States Bankruptcy Judge in the United States Bankruptcy Court for the Northern District of Mississippi in the aforementioned Chapter 11 proceeding of GML. The order granted the Emergency Motion for an Order authorizing debtor-in-possession to incur secured

indebtedness pursuant to section 364, and related relief. Lumbrezer testified that the Interim Order was entered on the same day the bankruptcy petition was filed. The Interim Order indicates that GMAC has agreed to provide an additional, postpetition loan to debtor GML. The Interim Order authorizes GMAC to loan debtor GML up to $300,000 to be secured by a subordinate lien upon all of the debtor's assets, subject to all duly and properly perfected security interests that existed as of the date of the filing of the petition, and subject to all the liens granted to Commercial Capital Lending, Inc, GML's primary working capital lender, as a result of its factoring arrangement and agreement. And the Interim Order specifies that the $300,000 additional advance from GMAC to debtor GML shall be utilized to, among other things, pay for purchases of raw materials and inventory, employees' salaries, and other expenses of administration, as necessary to allow debtor GML to fill existing and future orders from its customers. See paragraph 9 on pages 2 and 3 of the Interim Order.

Respondents, the General Counsel, and the Union entered into the following stipulation: "during the bankruptcy period, roughly April 2004 through March 2005, Gary Houston signed checks and drafts on a bank account that's capped – bank account was held by Grenada Manufacturing, LLC, debtor-in-possession." (Tr. 434-435.)

When called by Respondents, Anderson testified that money came from GMAC into the GML operating account, which he believed was at the Merchants

and Farmers Bank, and GML continued to bill, operate, purchase, and pay the employees.

General Counsel's Exhibits 17 and 18 are undated letters from Ice to certain of GML's customers. The bodies of both exhibits are identical. One has no letterhead. The other, the latter, has GML's letterhead. It reads as follows:

Grenada Manufacturing, LLC
"A Global Leader in Metal Fabrication"

635 Hwy 332 601-226-1161
Grenada, Ms 38901 601-226-1166 Fax

Dear Customer _____:

I am leading the team that has taken over the management of Grenada Manufacturing, LLC. We were brought in as the result of financial and operating difficulties the business was experiencing. We have found greater problems than expected, and as a result, we believe it is necessary to reorganize the business if we are to establish and maintain strong working relationships with our employees, customers, suppliers, lenders and the community at large.

Because your are a valued customer of Grenada Manufacturing, LLC, we want to inform you that the business has filed for Chapter 11 Bankruptcy reorganization on April 5, 2004. After considering all options, we believe that bankruptcy reorganization will ultimately be in the best interests of all

those involved with the Company, and will allow us to increase the financial strength of the Company. This process will be lead by the new management team, with me as General Manager, and has an established track record of success in the industry. We believe this will ultimately lead to:

The long term, stable employment of the approximately 150 employees of the Company;

Increased job opportunities for the area as we grow the business;

An increased tax base for the community;

Strengthening of lender, customer, and supplier relationships as the Company will be able to meet its obligations going forward;

Better service and supply of quality products for existing and new customers; and

A seamless transition to the new management team.

Both Grenada Manufacturing and I have a commitment to the employees, community, customers, suppliers and lenders of the Company, and we ultimately believe that a reorganization will be in everyone's best interest. Most importantly, we want to cooperate with all involved to minimize any negative impact on any of the Company's

> constituencies. To that end, I invite you to call Gary Houston at 662-226-1161 ext. 111 to discuss any questions or concerns you might have. After speaking with us, I think you will agree that going forward, Grenada Manufacturing will be a profitable, beneficial, and dependable member of the community.
>
> We look forward to hearing from you
>
> Sincerely,
> Howard E. Ice, Jr.

Lumbrezer testified that these letters were sent to about 20 of GML's customers; that they were sent shortly after April 5, 2004; that the purpose of the letters was to try to stop the bleeding at GML in that customers were "bolting" (Tr. 114), Ice spoke to a number of the customers explaining that he was going to turn this thing around, and he wanted them to give him a chance; and that Ice met with the secured creditors of the debtor to advise them of the progress that was being made.[7]

Lumbrezer testified that on July 12, 2004, GML filed a Motion to Expand Debtor-In-Possession Financing with the United States Court for the Northern District of Mississippi. The Motion (GC Exh. 23)

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[7] This was indicated in par. 12 at p. 4 of GML's amended motion filed in February 2005 with The United States Bankruptcy Court for the Northern District of Mississippi in GML's Chapter 11 Case No. 04-12077. GC Exh. 13.

indicates that movant needs additional capital and GMAC agreed to loan to GML an additional $300,000 and that the matter should be set for an emergency hearing at the court's earliest opportunity. On July 12, 2004, Judge David Houston issued an order scheduling a preliminary hearing on July 20, 2004 (GC Exh. 24). Lumbrezer testified that it was his understanding that this motion was granted around July 2004.

In September 2004, Collins telephoned Hardman. Hardman testified that Collins told him that Houston was doing away with the incentive program that was in the collective-bargaining agreement and Houston "was giving everybody a 75 cent an hour increase, . . . a 20 cent increase on the evening shift, and a 40 cent on the night shift. And he did that without speaking with the Union. And he asked me to call Gary Houston" (Tr. 34); that he telephoned Gary Houston and told him that he had a union at the Grenada facility and he could not make changes without getting with the Union; that Houston told him that he thought the incentive program was unfair to the majority of the people, only 10 percent of the people were making money, and he thought that was the fairest way; that he told Houston that he talked with Collins and if the Local agreed he would not have a problem with it; that the Local agreed; and that subsequently he signed the agreement, received herein as General Counsel's Exhibit 4. The agreement reads as follows:

AGREEMENT BETWEEN GRENADA MANUFACTURING ACQUISITION CORPORATION AND THE UNITED STEELWORKERS, LOCAL 202-A

(SUPPLEMENT TO TEMPORARY AGREEMENT BETWEEN GRENADA MANUFACTURING ACQUISITION CORPORATION AND UNITED STEELWORKERS LOCAL 202-A DATED MARCH 4, 2004)

The management recognized that the Incentive Program at the Grenada Plant did not provide a fair and equitable opportunity for all employees to enjoy increased earnings above their hourly rate. A proposal was presented to the employees to increase the base rates by $.75 per hour and increase the shift premium to $.20 for 2nd shift and $.40 for 3rd shift.

These changes would replace the Incentive System in the facility. This proposal was considered and approved by the United Steelworkers Local 202-A on September 7, 2004. The changes are to be effective on Sunday, September 5, 2004.

This agreement between the parties in no way opens any collective bargaining agreement and is made without precedent or prejudice.

The agreement is signed by Hardman, Collins, Paige, Topp, and Walker for the Union. In the column designated "FOR THE COMPANY," Gary Houston signed as general manager for Grenada Mfg. Acquisition and Melton signed as human resources manager.

In October 2004, Melton telephoned Hardman and asked him about an extension of the collective-bargaining agreement and said that they should meet because the Bankruptcy Court was taking longer than expected.

On October 22, 2004, Hardman, accompanied by Collins, Paige, Topp, and Walker, met with Houston, Melton, Anderson, who was general manager of GML and subsequently financial consultant of GMAC, and Rick Stanford, who was GML's vice president of production and is production manager of GMAC. Hardman testified that they agreed to an extension of the contract through January 31, 2005; and that it was determined that seniority would be recognized in reference to layoff and recalls. General Counsel's Exhibit 5 is the agreement. It reads as follows:

TEMPORARY AGREEMENT BETWEEN
GRENADA MANUFACTURING
ACQUISITION CORPORATION
AND
UNITED STEELWORKERS OF
AMERICA LOCAL 202-A

THE SUBJECT AGREEMENT DATED MARCH 4, 2004 AND THE SUPPLEMENTAL AGREEMENT (CONCERNING THE INCENTIVE PLAN AND SHIFT PREMIUM) EFFECTIVE SEPTEMBER 5, 2004 IS HEREBY EXTENDED TO JANUARY 31ST, 2005. IN ADDITION, THE COMPANY WILL RECOGNIZE SENIORITY DURING LAYOFFS AND RECALLS.

AGREED ON 22 DAY OF *OCTOBER*, 2004. . . .

Hardman, Collins, Paige, Topp, and Walker signed for the Union. In the column designated as "FOR THE COMPANY," Gary Houston signed as general manager and Melton signed as human resource manager.

When called by Respondents, Anderson testified that the environmental concerns were resolved in November 2004.

Gary Houston testified that in December 2004 he saw a union notice on the bulletin board regarding a meeting about the future of the Union; that he asked Paige, who is a union leader, what did the Union mean about the future of the Union; and that Paige told him the [sic] they were going to discuss what the Union does for the employees.

Paige testified that in December 2004 he posted a notice on the union bulletin board regarding a union meeting to discuss the future of the Union; that there was a union meeting to discuss with the employees that while the Company was having cookouts and giving out caps and T-shirts and saying that they were going to recognize the Union, he did not believe that the Company was going to recognize the Union and he wanted to make sure that the union members understood what was going on; and that prior to the meeting Gary Houston asked him about the notice regarding the union meeting and he told Houston that he was trying to get people excited and maybe they would come to the union meeting, "[c]ause [sic] there was a study saying that it was very low, and I wanted to kind of build it up." (Tr. 271.)

General Counsel's Exhibit 16 is titled "Grenada Acquisition Corp., General Ledger." Lumbrezer testified that the exhibit is a portion of the General Ledger for GMAC which shows basically the financing between GMAC and ICE industries and how the funds were used[8]; that he prepared the exhibit for the hearing herein, and it was given to the Board pursuant to a subpoena that was served in ICE Industries; that the underlying documents that he referred to in preparing the exhibit are bank statements, checks, wire transactions used to finance GML, and some subcontracting work that was done for ICE Industries that GML was paid for, which would have really been an offset to the financing ICE Industries gave GML as far as GML working off some of that financing and paying some of that debt back; that he did not refer to the 2004 full ledger of GMAC in preparing this excerpt of the full ledger; that GMAC was little more than a bank account conduit between ICE Industries and GML; that the exhibit reflects a payment of $50,000 to B. J. Anderson, who in March 2004 was no longer general manager of GML; that he did not know Anderson's title as of the ledger entry date, namely, March 3, 2004, but at the time Anderson worked for GML; that he was not sure what the payment to Anderson was for; that the payment to

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[8] The abbreviated ledger has columns specifying the date of the transaction, a description of the transaction, the cash amount involved, the amount to or from "Intercompany Ice," and the "Grenada Loan."

Anderson was not part of the loan to GML that it was responsible for repaying; that the exhibit shows a payment of $5,000 to Jay Gore, an attorney in Grenada; that the exhibit shows a payment or [sic] $17,500 to Harris and Geno, which is the law firm which took GML through bankruptcy and also did work for GMAC; that the payment to Harris and Geno was for work done for ICE Industries and it was paid by GMAC; that GMAC maintained an arm's-length relationship with GML; that ICE Industries chose to get advice from the same law firm which was representing GML in bankruptcy because ICE Industries was advised that the firm was the best in Mississippi[9]; that he could not explain why the $200,000 indebtedness from March 16, 2004, which is covered in General Counsel's Exhibit 21, is not an entered in the 2004 GMAC abbreviated ledger (GC Exh. 16); that this indebtedness and any repayment should have been reflected on General Counsel's Exhibit 16; that the $200,000 is probably on Deerfield Manufacturing's, another subsidiary of ICE Industries, books and not on GMAC's books since the work went through Deerfield; that while the original intent was to transfer the work from Deerfield to GML to save transportation costs, the customer would not allow Deerfield to transfer the work to GML; that

[9] Subsequently, Respondents' attorney stipulated that the services of the law firm of Harris and Geno were performed on behalf of Grenada, LLC, and Harris and Geno did not perform services on behalf of Grenada Manufacturing Acquisition. (Tr. 304.)

certain of the funding to GML was unsecured; that the abbreviated General Ledger shows that $203,000 was transferred from ICE to GMAC at the end of April 2004, and this amount was paid to "?????"; that the $203,000 went to an escrow account, he had no clue what it was so he made the entry the "?????"; that eventually the $203,000 was loaned to Stanford who works for GML and was a project manager for GSA at the time of the trial herein (on the ICE Industries Organizational Chart, GC Exh. 15, there is a Stanford listed as "Mfg. Mgr." under Grenada Acquisition Corporation); that Stanford had to get caught up on taxes; that *ICE Industries was working to build up GML but at the same time ICE Industries wanted to make sure that if it walked away from the purchase, ICE Industries would take as much as possible with it*; that GMAC was not part of certain of the transactions listed for December 31, 2004, because the transactions were done in the normal course of business through Deerfield Manufacturing; that customer Electrolux erroneously deducted steel from the GML check when the deduction should have been from Deerfield; and that some of the December 31, 2004 entries show how the customer's errors were corrected.

When called by Respondents, Anderson testified that originally it was not his intent to stay with Ice's company once it bought GML, Ice asked him to stay for a while to help with the transition, and he agreed provided Ice pay him $50,000 and pay North Central Planning Development the $2,216.74 he owed it. On

cross-examination, Anderson testified that the date of the entry of the $50,000 payment to him on General Counsel's Exhibit 16 is March 3, 2004; that originally it was anticipated that the sale would go through 2 or 3 months after they entered into the Management Agreement and the Asset Purchase Agreement; that the sale was delayed by the bankruptcy proceeding; that he did not know what the December 31, 2004 entry, namely "Expense Retainer (BJ)" on page 2 of General Counsel's Exhibit 16 meant, there is no amount with the entry, and he did not receive any money from GMAC in December 2004[10]; and that payments from GML's customers, payments for GML's scrap metal, and funds from ICE Industries were co-mingled in one bank account, and GML's bills were paid out of that account.

In response to questions of Respondent's attorney, Lumbrezer testified that there were points up to the date of the bankruptcy hearing and subsequent purchase by ICE Industries that ICE still would have walked away from the purchase because there was a certain threshold that it could not cross; that one of the possible deal breakers was the need for an agreement with the PBGC; that GML's (and GML's

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[10] With respect to an updated version of GC Exh. 16 (marked for identification as GC Exh. 42), which had $50,000 in the entry for December 31, 2004, "Expense Retainer B.J.," Anderson testified that it looks like it is an internal entry done to correct a prior posting, and he did not receive any payment in December 2004. Counsel for the General Counsel did not offer GC Exh. 42 into evidence. (Tr. 383.)

predecessor's) pension fund had been under funded by between $1.5 and $3.5 million, which was a huge liability; that on the morning of the final bankruptcy hearing in late February or early March 2005 something was worked out with PBGC; that in late 2004 or early 2005 the environmental issues were resolved so that ICE Industries was not liable for GML's and its predecessor's polluting, which would have bankrupted all of ICE Industries; that at one point ICE Industries financed GML for almost $2 million, and all but $600,000 was unsecured; that *in reality everything was unsecured because there were no assets to back up even the secured interests, there were too many people in front of ICE Industries*; that GSA finally took over the involved operation on March 30, 2005; and that *every contract that customers and vendors had with GML was voided because ICE Industries did not want to be bound by anything.*

On January 24 Hardman, Collins, Paige, Topp, and Walker met with company representatives Melton and Anderson. The purpose of this meeting was to extend the collective-bargaining agreement. General Counsel's Exhibit 6 reads as follows:

TEMPORARY AGREEMENT BETWEEN
GRENADA MANUFACTURING, LLC
AND
UNITED STEELWORKERS
OF AMERICA, LOCAL 202-A

THE SUBJECT AGREEMENT IS EXTENDED FROM JANUARY 31ST, 2005 TO FEBRUARY 23RD, 2005.

AGREED ON *24TH* DAY OF *JANUARY*, 2005 BY:

. . . .

Hardman, Collins, Paige, Topp, and Walker signed for the Union. In the column designated "FOR THE COMPANY" Anderson signed as president and Melton signed as human resource manager. Hardman testified that he asked why they just did not extend the contract until the Purchase Agreement is done so he would not have to come to Grenada every month for an extension; that Anderson said that the Bankruptcy Court had assured them that the Bankruptcy Judge would sign the papers on February 23, 2005; and that if they needed more time, Anderson would fax him the extension for his signature so that he would not have to keep coming back to Grenada.

When called by the Respondents, Anderson testified that on the day of the final hearing in the bankruptcy proceeding, February 23, PBGC agreed to accept a specified amount from ICE Industries to settle the pension liability issue.[11]

On February 24 or 25 Hardman telephoned Melton and he was informed by Melton and Anderson, who was in Melton's office, that the bankruptcy judge had finalized the paperwork and by law the creditors had 10 days to appeal. Hardman testified

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[11] The amount is specified on p. 10 of GC Exh. 14.

that he told Melton that they needed another extension and Anderson said, "Oh no, we're not extending the contract anymore" (Tr. 40); that he asked why and Anderson said that he was advised by his attorneys not to do any more extensions; and that he told Anderson that he would call the Union's attorney.

General Counsel's Exhibit 14 is a 21-page order dated March 10, 2005, signed by Judge David Houston which grants the amended Motion to Sell Substantially All of the Assets of the Debtor-in-Possession, Free and Clear of liens, Claims and Interest, With Assumed Liens, Claims and Interest Attaching to the Transferred Assets, Outside the Ordinary Course of Business (the "Sale Motion"), which order was prepared by Harris and Geno.

According to the testimony of Tarik Johnson, who is an attorney in Grenada, on March 16 or 17, Gore, who is the Grenada County attorney and represented GML, telephoned him, told him that he was looking for someone who had no affiliation with GML, and asked him if he was interested in overseeing a poll of GML's employees; that he told Gore that he was; that the next day Anderson telephoned him and told him that the voting would take place on March 24 and would probably start on the first shift around 7 a.m.; that "pretty much" (Tr. 58) the only instructions that Anderson gave him was that he should be at the plant at 6:45 a.m.; that Anderson told him what date the polling would take place; and that he had no input with respect to the selection of the date.

Melton testified that the idea of a poll was first considered "[j]ust a very few days" (Tr. 230) before the poll; that the decline in union membership was something he Gary Houston, and Anderson were concerned about; that the Company was trying to get the union dues paid and the Company was behind on submitting the dues to the Union; and that the Union did receive the dues owed.

Melton testified that he was present at a meeting on March 23 when the local union officials, Collins and Paige, were first advised about the poll; that either he or Anderson prepared General Counsel's Exhibit 38, which is a record of the meeting, contemporaneously with the meeting; that he is familiar with the document and it seems to be accurate; that at the meeting he provided the officers of the local union with a notice that was going to be posted at the facility that announced the poll; that the notice had not been posted in the facility prior to this meeting with Collins and Paige; that he was not sure what time of day this meeting was held; that at the time of the meeting with Collins and Paige the date, time and location of the poll had already been determined and all of the arrangements with Johnson had been determined; that he did not make the arrangements with Johnson and he is guessing that the arrangements were made a couple of days prior to the poll; that the Union officers objected to the short notice of the fact that this poll was going to be conducted; that the union officers said during this meeting that they needed time to consult with the International

representative or higher ups in the Union; that "[w]e told them that it was just a poll was all it was, just to get the true feelings of the people" (Tr. 235); that he or Anderson told Collins and Paige, in essence, that "[t]his isn't anything you need to be concerned about. It's just a poll" (Tr. 237); and that they told Collins and Paige

> it's a poll of everyone's opinion. The Company don't [sic] understand why a day or a month matters in a circumstance like this. Our hands were tied until we received word that the [Bankruptcy] judge had signed the court documents. It wasn't like something we had planned or intended to do or dreamed about or pondered over or anything like that for a period of time. [Id.]

Melton further testified that the poll was something that had been thought about for a short period of time; *that he never told the union officials what the Company intended to do if there was a majority vote that did not support the Union*; and that he did not remember (1) the question of the Union having an observer during the polling come up at this meeting, and (2) whether there was any mention made to the Union as to whether they might want to have someone present at the count of the ballots.

General Counsel's Exhibit 38 reads as follows:

3-23-05

MEETING WITH LIN COLLINS AND BENNIE PAIGE REGARDING THE POLL

CONCERNS THEY HAD:

- WHY IS THE COMPANY DOING THIS? (TO DETERMINE THE FEELINGS OF THE PEOPLE DUE TO THE MEMBERSHIP BEING SO LOW)
- WHAT IS THE COMPANY GOING TO DO WITH THIS INFORMATION? JUST TRYING TO DETERMINE WHAT THE PEOPLE WANT. (MANAGEMENT ALWAYS WANTS TO KNOW THE FEELINGS OF THE EMPLOYEES IN MATERS [SIC] RELATED TO THE WORK ENVIRONMENT)
- WE DON'T KNOW IF THIS IS LEGAL OR NOT; WE HAVE TO CONSULT WITH OUR REPRESENTATIVE. THAT'S WHY WE ARE GIVING YOU THE COURTESY OF INFORMING YOU BEFOREHAND AND ANSWERING YOUR QUESTIONS; BUT YOU CAN TALK TO YOUR REPRESENTATIVE ALSO – KEEP IN MIND THIS IS ONLY A POLL) [no "(in original]
- WHO IS THIS 3RD PARTY OBSERVER? (SOMEONE THAT WAS NOT RELATED TO THE COMPANY OR THE UNION. HE WILL BE AVAILABLE TO MAKE SURE EVERYTHING IS HANDLED ABOVE BOARD)
- WE ARE NOT SO SURE THAT THE PEOPLE IN THE UNION CAN VOTE – BY THEIR CARDS THEY HAVE INDICATED THEIR CHOICE AND WE DON'T CARE DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD WHAT YOU DO WITH THE NON-UNION PEOPLE. (THE COMPANY DOES NOT DISTINGUISH ONE BETWEEN THE OTHER – EVERYONE IS

AN EMPLOYEE AND SHOULD HAVE THE RIGHT TO EXPRESS THEIR OPINION. WE WANT EVERYONE TO VOTE. IT'S THEIR OPINION AND WE WOULD LIKE TO KNOW HOW THEY FEEL. [no") IN ORIGINAL]

- YOU GUYS HAVE BEEN PLANNING THIS FOR A WHILE NOW AND TO TELL US TODAY AND HAVE THIS THING TOMORROW – WE NEED MORE TIME TO STUDY THIS. (REMEMBER, IT'S A POLL OF EVERYONE'S OPINION, THE COMPANY DON'T [SIC] UNDERSTAND WHY A DAY OR A MONTH MATTERS IN A CIRCUMSTANCE LIKE THIS. OUR HANDS WERE TIED UNTIL WE RECEIVED WORD THAT THE [BANKRUPTCY] JUDGE HAD SIGNED THE COURT DOCUMENTS.)

- WHY DOES GMAC WANT TO DO THIS – THIS LOOKS LIKE SOMETHING THAT ICE INDUSTRIES MIGHT DO AFTER THEY TAKE OVER? AGAIN, IF WE READ THIS NOTICE, IT STATES THE MEMBERSHIP IS VERY LOW AT THIS TIME – WHY WE DON'T KNOW. IS THAT AN INDICATOR THAT THE MAJORITY OF THE EMPLOYEES DO NOT WISH TO BE REPRESENTED BY A UNION? MANAGEMENT DON'T [SIC] KNOW AND IT WOULD BE WRONG TO US TO BE PRESUMPTOUS [SIC] JUST BASED ON THAT FACT. WE TRULY WANT TO KNOW AND FEEL THE PEOPLE – ALL THE PEOPLE HAVE THE RIGHT TO LET US KNOW WITHOUT ANY . . . [G]UESSING ON OUR PART. [no "("or")" in original]

Paige testified that he is a department leader with GSA; that he is treasurer of the Union; that the Union has represented employees at the involved facility since 1967; that he attended a meeting on March 23 with Collins; that Melton and Anderson were present at this meeting; that at this meeting the Company presented him and Collins with a notice that the Company was going to post on the bulletin board about a polling the next day; that General Counsel's Exhibit 7 is the notice that he and Collins were given that day; that Melton and Anderson said that it was "[j]ust a poll. And they say [sic] it wasn't going to take no [sic] effect on anyone" (Tr. 246); that the company representatives said that the poll was to see how many of the employees wanted to be represented by the United Steel Workers of America; that Collins said that they needed to call their representative or lawyer and they did not have enough time to do it before the next day; that when he asked why the concern if they are in bankruptcy and going out of business, Anderson said that he had been hired the day before; that the meeting occurred about 1:30 p.m.; that he works on the first shift which is from 6 a.m. to 2:30 p.m.; that on March 23 he was working to 2:30 p.m.; that the second shift starts at 2 p.m.; that the company representatives told him that the Company hired an attorney, Johnson, who was not affiliated with the plant, to conduct the poll; that the Company did not discuss observers and the Company indicated that Johnson would count the ballots once the count was over; that Melton said that Johnson would do it all and the Company was not supposed to

have anything to do with it; that the poll was supposed to begin at 7 a.m. the next day; that he did not speak to the entire unit before the poll because he did not have the time in that he had to go back to work after he left Melton's office; that had he been given more notice he would have called a special union meeting and told the employees what he had been advised by the International representative or the International lawyer, and, if the poll was legal, he would have made sure that the Union had someone to observe it, just like the Company did, and to help count the votes to make sure the vote was counted right; that the two union bulletin boards were taken down the week after the poll; and that at least two union members were not at work the day of the poll and if he had been given sufficient notice, he would have contacted these individuals.

On cross-examination, Paige testified that he tried to telephone Hardman the afternoon of March 23, he was unable to reach him, and he left a voice mail; that he thought that Collins spoke with Hardman but he was not sure; that he had no direction from the Union prior to the poll on what to do, and whether to vote or not to vote; that he did not know that the purpose of the poll was to determine the union support, he had a lot of faith in Melton and Anderson, he always respected what they said, and he had no reason to think that they would tell him a lie; and that if the Company wanted to harass the nonunion employees about joining the Union, that was fine.

Collins testified that the Union had represented the employees at the Grenada facility for over 30 years; that on March 23 he was called to Melton's office, along with Paige, who was the Treasurer of Local 202, between 1 and 1:30 p.m.; that Anderson was present and Melton said that they were going to have a poll to determine how many people wanted to be represented by the Union; that he objected, saying that he thought it was illegal; that they said, "[t]here's no problem with it. It doesn't mean anything. We just want to find out." (Tr. 282); that Paige said that he did not have a problem with them doing a poll on nonunion members, but union members had already spoken by being members; that Melton said that they were going to have an independent person, Local Attorney Leon Johnson's son, do the poll the following day; that he told Melton and Anderson that it was illegal as far as he was concerned because they were going to do the poll the next day; that Melton and Anderson showed them a notice (GC Exh. 7), of the poll which the Company was going to post; that this was the first time he saw the notice; that he told Melton and Anderson that he felt that by them giving him and Paige notice on Wednesday of a poll to be taken on Thursday, there was some kind of ulterior motive, and he needed time to contact the Local's International representative; that Melton and Anderson did not offer the Union the opportunity to have an observer present at the poll or at the ballot count; that he left work that day at 2 p.m.; that as he was leaving the building he saw the aforementioned notice posted in the entrance of the plant; that he

telephoned Hardman, spoke with him about 4 or 4:30 p.m., and told him about the poll; that Hardman told him that he would contact the attorney for the International; that he did not hear back from Hardman before the next morning when he reported to work at 5:45 a.m.; that he did not have a chance to speak with the other employees about the poll because there was not enough time; and that if he had been given more notice of the poll he would have had an opportunity to contact the International representative who in turn could have contacted the International's attorney, and he would have met with the employees and explained to them what the polling was all about and what it could mean for the Local.

On cross-examination, Collins testified that when he spoke with Hardman over the telephone, Hardman told him that he thought that the poll was illegal; and that he did not know that if the Union lost the poll, the Union would no longer be recognized.

General Counsel's Exhibit 7, which was posted after Anderson and Melton met with Collins and Paige, reads as follows:

NOTICE

> Since the union membership is so low, *Grenada Manufacturing Acquisition Corporation* wants to determine the workforce's desire for union representation. In accordance with that wish on Thursday March 24, 2005, Grenada Manufacturing Acquisition

Corporation will conduct a poll to determine that level of interest.

The poll will be conducted in the cafeteria.

First shift polling will begin at 7:00 am.

Second shift polling will begin at 2:00 pm.

Employees will be released to vote by department.

Any question about the ballot or what it means can only be answered by an independent 3rd party observer.

Once an employee has completed their vote, the employee will put their ballot in the sealed ballot box.

The ballot box and left over ballots will be sealed up and stored in a secured location until the second shift.

After all employees who wish to vote have, an independent 3rd party will count votes. [Emphasis added.]

On March 23, Collins telephoned Hardman. Hardman testified that Collins told him that Melton called him and Paige in at the end of their shift; that Melton told them that they were getting ready to do a survey the next morning at 7 a.m. to see how many people still wanted to be represented by a Union; that he told Collins that he thought that such a survey would be illegal but it was late in the day, the

attorneys had gone home, there was nothing he could do, and he would telephone the Union's attorney the first thing the next morning; that he asked Collins who was doing the survey and Collins told him Melton and Anderson; that he asked why they would be concerned and Collins told him that Melton and Anderson had been hired by Ice; and that if he had been advised earlier that the poll was going to occur, he would have (1) told Collins to talk to all of the workers, (2) had people at the polls to verify who was voting, (3) made sure that there were no managerial or clerical people, (4) insisted that the Union have some say as to who the third-party representative would have been, and (5) made sure that the Union had people at the vote count to verify its accuracy.

On March 24 Johnson arrived at the involved Grenada plant at 6:45 a.m. He testified that he met with Anderson who explained that they were conducting a voting poll regarding a union; that Anderson gave him the ballot sheets and a ballot box; that he did not receive any further instructions and "they pretty much let me conduct the process the way I saw best" (Tr. 61); that the ballot box was already upstairs in the cafeteria where the poll was conducted; that General Counsel's Exhibit 10 is a diagram he drew of the way the cafeteria was set up during the voting; that during the voting Human Resource Manager Melton and payroll employee Anita Yancey were present in the cafeteria; that he did not ask Melton to stay in the cafeteria during the voting; that Melton sometimes sat at the table with Yancey, who had an

employee roster; that the ballot box was placed on the same table; that at times Melton was back and forth, "[h]e would leave out of the cafeteria area" (Tr. 63); that he had groups of three employees go to Yancey so that she could "check off their names . . . so they could keep an accurate count of who voted" (Tr. 64); that the table where Melton and Yancey sat was 10 to 15 feet from the closest voting table; that employees started coming to him about 7 a.m. in groups of 2 to 15; that as the employees entered the cafeteria he had them sit in an area away from the voting table area; and that he introduced himself to the employees, telling them

> I was a local attorney and that I was overseeing the voting process to make sure that no one was harassed or intimidated. I also explained to them that I am not affiliated with Grenada Manufacturing whatsoever and that I didn't have an interest in the outcome of the results of the voting. [Tr. 65.]

Johnson further testified that he told the employees to direct their questions to him; that he read the ballot to the employees; that he kept the ballots in his possession the entire time; that he did not read from a script; that he did not say anything else to the voters, except a couple of voters may have asked him how they should vote and he told them individually that it was up to them as to whether they should vote yes or no for the Union; that after he gave the employees the instructions, he asked them if they had any questions; that if no one had any questions, he

called the employees up in groups of three to go over to the table where the employee roster was located; that he would hand the three employees their ballots and then they would tell Yancey their names; that he then had the three employees go the three voting tables; that there were no dividers or curtains or anything blocking the view of the tables; that once the employees voted they took their ballots and dropped them in the ballot box on the table where the employee roster was kept; that he told the employees to fold their ballot and insert it into the ballot box; that there were two voting sessions, namely 7 a.m. and 2 p.m.; that the cafeteria was set up the same, the procedures were the same, and Melton and Yancey were at the same table for both sessions; that he stopped the session when either Melton or Yancey told him that everybody had voted; that after the second session Yancey checked how many people were on her roster and how many people voted, and then he, Melton, and Yancey counted the ballots; that Yancey was the one who checked the employees off on the roster of employees; that Melton was familiar with some of the employees and he assisted Yancey in locating some of the employees names; that he stood next to the employee roster table while the names were checked off; and that Yancey did not ask anyone to verify their identity.

On examination by Respondents' counsel, Johnson testified that only he talked to the employees while they were in the waiting area in the cafeteria; that he told them that

> I was here to ensure that there were no harassments or intimidation. That any one – that no one was intimidated or harassed during the process to make sure that the voting process ran smoothly and it was a fair process. [Tr. 74.]

Johnson further testified that while he was overseeing the poll he did not witness any acts of intimidation, threats, or harassment; that he was not aware of any employee being forced to vote against their will; that one employee did not take a ballot and he refuse to vote[12]; that the ballot box was a metal box with a little opening in the top, and it had a slide opening on the side with a loop for a lock to keep it shut; that he was given a packaged lock and he opened the casing and removed the lock and the two keys that came with the lock, and he "took possession of both keys" (Tr. 77); that he made sure that the ballot box was empty before the voting took place; and that when the first session ended at about 8:30 a.m. he opened the box and taped the opening at the top from the inside of the box, closed the box, taped the opening at the top of the box from the outside of the box, locked the ballot box with the lock that was provided, and took the box downstairs to an office. Johnson further testified as follows:

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[12] Johnson identified Hardman, who was sitting in the courtroom at the time, as the employee who refused to take a ballot and vote.

> Q. Okay. And did *you* lock the office up when you left?
>
> A. Right. The office was locked. And I kept possession of the key. [Tr. 79] [Emphasis added.]

Johnson further testified that he then left the facility; that he returned to the facility about 1:45 p.m., took the ballot box back to the cafeteria, removed the inside and outside tape, and determined that the box had not been tampered with because no one could have gotten into the box to retape it from the inside; that Respondent's Exhibit 38 is a copy of the blank ballot that was used[13]; that Respondent's Exhibit 39 is a copy of the roster that was used for both shifts; that Yancey checked off the names on the roster; that the first page of Respondent's Exhibit 39 indicates that Collins "Refuse[d] to vote"; that Respondent's Exhibit 41 is (a) the sheet of paper on which he counted the "yes" and "no" ballots, and (b) a copy of the tape, initialed by him, which he used on the outside and inside of the ballot box between sessions; that his payment in no way influenced his ability to conduct a fair election poll; that he did not observe Melton trying to influence voters but he did observe Melton "say to employees or voters . . . , 'Hello,' or 'How you

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[13] It reads as follows:

> Do you wish to be represented by the United Steelworkers of America?
>
> [ ] Yes Union [ ] No Union

doing?' Just general speaking to them" (Tr. 84); that he did not observe Yancey saying much to the employees, and most of the time employees would just give their names; that he walked three employees to the table where the employee roster was located, he handed the three employees a ballot, the three employees gave their name to Yancey, each of the three employees went to one of the three voting tables – all of which had a chair, the three employees marked their ballot while either standing or sitting, he stood next to the table where the employee roster was kept while the employees marked their ballot, the three employees folded their ballot and placed them in the ballot box which was on the table where the employee roster was kept, and he then accompanied another three employees to the table where the employee roster was kept; and that he did not observe anything intimidating or hostile.

In response to further questions of counsel for the General Counsel, Johnson testified that his statements to employees concerning his assurance that there would be no harassment or no coercion of the employees voting pertained only to the time that the employees were present and actually voting in the cafeteria because he was only there for that particular day; and that he did not know whether the employee who refused to vote may have been fired by the Company following the day of the poll. Johnson further testified that Yancey probably could have performed her task, namely getting the employee's name and placing a check mark on the roster next to

the name, without Melton but it might possibly have taken longer.

Subsequently Johnson testified that with respect to the keys to the lock on the ballot box, he "kept the keys on my possession the entire time." (Tr. 91) He then testified as follows:

> JUDGE WEST: You locked the facility?
>
> THE WITNESS: Correct.
>
> JUDGE WEST: You placed the locks – the locked box taped inside and out in [an] office in the facility?
>
> THE WITNESS: Right.
>
> JUDGE WEST: And you locked the office and you took the key to the office?
>
> THE WITNESS: No, I never had the key to the office.
>
> JUDGE WEST: Okay.
>
> THE WITNESS: I locked the box into that office. And the office was locked. [Tr. 91.]

Johnson further testified that the ballot box was 12 inches long, 10 inches high, and 10 inches deep; that he did not recall whose suggestion it was to leave the box in the office out of his possession between sessions; and that it was his idea to leave the box in the office out of his possession between sessions.

Paige testified that he worked on March 24; that the poll was conducted on that date; that he has a

walkie-talkie and he heard Gary Houston, the general manager, call different supervisors on the walkie-talkie, telling them to release employees to go up to the cafeteria; that Houston called the supervisor's name and told the supervisor to send their employees upstairs to do the voting; that no one told him that it was time to go vote; that he went upstairs to the cafeteria to vote between 1:30 and 2 p.m.; that prior to reaching the cafeteria no manager or supervisor told him that he was not required to vote or that there would be no discipline or reprisals based on the results of the poll; that when he first reached the cafeteria Johnson came up to the employees, introduced himself, told the employees that he was there to conduct the poll and make sure it was done right, and asked the employees if they had any questions; that Johnson gave the employees a ballot; that the ballot box was not on the employee roster table but rather on the table on the right of General Counsel's Exhibit 10, next to the designation "wall with window"; that there was no one at the table where the ballot box was located and the nearest person to the ballot box was Melton and Yancey who were at the employee roster table; that the table at which he marked his ballot did not have any curtains or dividers; that there were two other employees with him when he voted; that while he was in the cafeteria Johnson did not tell him that he was not required to vote or that there would be no reprisals or discipline based on how he voted or on the outcome of the vote; that the table that Yancey and Melton were at was about 10 feet from where he filled out the ballot; that

he went back to work after he place his ballot in the ballot box; and that later in the personnel office he was told by Melton that the vote was 67 to 46 in favor of the Company.

Collins testified that on March 24 his supervisor, James Galiday, told him that he needed to go upstairs to vote; that Galiday did not tell him that he did not have to vote if he did not want to; that prior to going to the cafeteria neither Galiday nor any other supervisor or manager told him it did not matter how he voted, if he decided to vote or that there would be no reprisals or discipline based on the outcome of the vote; that when he entered the cafeteria he saw a young man and then he saw Melton and Yancey sitting at a table; that there were no other hourly employees in the cafeteria at the time; that the young man told him that they were taking a poll, and if he wanted to be represented by a Union he would vote yes and if not vote no; that the young man did not show him anything and he did not say anything else; that he told the young man that he was not going to vote because he felt that the poll was illegal; that he was not given a ballot while he was in the cafeteria; that he went back to work; that later that day he telephoned Melton and asked him what the results of the poll were; that Melton told him that 67 employees did not want to be represented and 46 did want to be represented; that after the poll the Company did not continue to bargain with the Union and consult with the Union; and that no supervisor or manager told him that there would be no retaliation against him

based on whether or not he voted. On cross-examination, Collins testified that he did not tell his supervisor that he did not want to vote; that his supervisor did not force him to go to the cafeteria; that he knew that he was free to go to the cafeteria or not; that he went to the cafeteria to inspect the polling place; and that Johnson did not offer him a ballot because he told Johnson that he did not want to vote.

When called by Respondents, Melton testified that he was in the polling area strictly to assist Yancey to identify the people who were coming in to vote; that Yancey was unsure of the names of the employees; that he did not talk to any employees while he was in the polling area; that he did help Yancey; that he was in the polling area for the entire polling period; that he, Yancey, and Johnson were present when the votes were counted; that he could not remember if Paige was there or not; that he did not remember Paige asking to be present when the votes were counted; that the vote count took place at 3 or 3:30 p.m. on March 24; that Johnson was in charge of the counting of the ballots, and after he did it twice, Johnson asked Yancey to verify his count; that after they were counted, Johnson put the ballots in sealed envelopes and placed the envelopes back in the ballot box; and that he had a copy of the ballots. On cross-examination, Melton estimated that there were about 70 employees on the first shift and about 30 on the second shift. He testified that Respondents'

Exhibit 46 is the ballots which were counted on March 24.

Jermaine Seals, who was hired by GML in 2000, testified that he resigned from the Union in 2004; that on March 24 "[a]ll of us had to go up there and vote on the poll. And the guy they had up there he read us the rights about it. And everybody gave them their answer, yes or no about the Union" (Tr. 389); and that the black local attorney "said it was illegal to do it as far as voting on the Union thing" (Tr. 390), and "[w]ell you know for us to give a yes and a no about the Union." (Id.) After objections to Respondents' attempts to lead this witness were sustained, the following testimony was given on direct:

> Q. What, if anything, did Mr. Johnson tell you about the poll?
>
> A. I really can't remember. You know because like it was how I do. I had to think before I do it. And I just, you know. [Tr. 391, 392.]
>
> . . . .
>
> Q. BY MR MCKEE: . . . .Was the purpose of the poll communicated to you by Mr. Johnson, the attorney, at the poll?
>
> A. He spoke, yeah, upstairs.
>
> Q. What did he say?
>
> MR. DOOLITTLE: Objection. Asked and answered, Your Honor.

JUDGE WEST: Overruled.

Q. BY MR.MCKEE: You can answer.

A. I really can't remember what he said. It was a while back. [Tr. 398.]

There was no cross-examination of this witness.

James Clark, who has worked at the involved Grenada facility for 22 years, testified that he resigned from the Union in 2003; and that he was not sure he read the notice of the poll but he heard about the poll. Clark testified as follows on direct:

Q. What, if anything, was told to you regarding the purpose of the poll?

A. It was just where we were going to vote the Union in or vote it out. [Tr. 400.]

Clark further testified that he works on the second shift; that "[w]e was [sic] instructed to go upstairs to the break room upstairs. And they was [sic] going to vote on the Union" (Tr. 402); and that "when we come in in the evening at two o'clock, we went straight. Everybody that – I . . . forgot who it was that instructed us. But they instructed us. . . . to go upstairs. And we would vote before we started to work." (Tr. 402, 403.)[14] Clark finished with the following testimony on direct:

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[14] The Charging Party's objection to this testimony was overruled.

Q. And describe to us what occurred.

A. Well, went upstairs. And there was a guy there I had never seen before. And I guess he was a mediator or what it was. And he was standing on – he was in a seat. And I don't remember the exact words or anything, but he was there to make sure everything went right. And that's what I understood.

And they [sic] may have been others in there too, but I remember that guy because I didn't know him. And he was a black guy and had a suit on. And so I – but what I heard that he was the mediator.

Q. And to the best of your recollection, what did he tell you about the voting process?

A. I can't remember that.

Q. And did anyone force you to go vote?

A. MR. DOOLITTLE: Objection. Leading.

JUDGE WEST: Sustained.

Q. BY MR. MILAM: How did you get the ballot?

A. I believe it was either handed to us, or we picked it up at the table. I can't remember.

Q. And what did you do with the ballot once you received it?

A. I went and voted one way or the other. I believe we went to a different – it was like regular voting to me where I vote

> down at home. You go and make – mark what you want to vote and turn it in. And that's all. Didn't take too long. [Tr. 403, 404.]

There was no cross-examination.

Norris Kendall testified that he has worked at the involved facility for 22 years; that he works on the first shift; that he was told the purpose of the poll was "to see whether they wanted to keep the Union or they didn't want to keep the Union" (Tr. 406); that no one told him that it is now time to go vote; and that when he went to the polling area:

> It was a lawyer to represent the voting, to see whether it went right or wrong. And he done [sic] all the talking. He told us that he was there to make sure the election was run right and if we had any problems to see him. And he said this is for the Union vote. Vote yes or no if you for the Union or you do not want the Union. And he was the only one who done [sic] the talking. And if you need any help, you had to look for him. And he was standing right there. [Tr. 406.]
>
> . . . .
>
> . . . . Yes, sir. He did say that it's your right. That wasn't nobody [sic] putting you under any pressure to vote or not vote. That it was entirely up to you to vote or not vote. But if you voted, he explained about the election like I told you. Vote yes or no. And I was up

> there, I did not see nobody get no [sic] help from him. [Tr. 407.]

Kendall further testified that Yancey and the lawyer gave him the ballot; and that the ballots were on the same table that Yancey was seated at. On cross-examination, Kendall testified that he resigned from the Union about 10 years ago; that he talked with Respondents' attorney, Kenneth Milam, 2 months before the trial; that Milam talked with him about his prospective testimony on the third day of the trial herein, December 14, just a few moments before he testified, which was immediately after Clark got through testifying; that the notice about the poll (GC Exh. 7) was posted in the plant for a week before the poll; that he was called on his walkie-talkie and told that his department should come up to the cafeteria and vote; that he did not know who called him on his walkie-talkie; that he was a team leader so he had a walkie-talkie; and that he voted in the same group that voted with Paige.

Joe Frank Walker, who has worked at the involved Grenada facility for about 12 years, testified, with respect to what he was told about the purpose of the poll, that "[i]t was just general discussion as the best I remember that we were going to have an election whether or not the Union was going. The vote, I don't remember anyone telling me specifically about" (Tr. 421); that he really did not recall who told him to go vote; that he was told to go to the cafeteria; that he was working on the first shift; and that

> [w]hen I went up there, they had an attorney to explain the process which we followed in voting. And the tables which we normally eat at were spaced approximately six feet apart or so. They had a ballot. And I don't remember even how I got the ballot. Seems like the ballot was on the table, maybe. And sat down [sic] and voted. [Tr. 422.]

Walker further testified that he did not recall a whole lot of what the attorney told him because he knew what it was about, "I didn't pay much attention to . . . [what the attorney said]. I knew it was to vote to retain the Union or discharge it." (Tr. 423.) Then Walker gave the following testimony on direct:

> Q. And did he say anything about – what, if anything, did he say about harassment or intimidation?
>
> A. Yes, that there would be none. No repercussions from the Company which way you voted. Didn't matter. And it sure didn't matter to him cause he was an independent advisor.
>
> Q. And then you went and – after you received your ballot, describe what you did.
>
> A. Over at the table there was just one person per table. And they were spaced, as I say, approximately six feet apart. And sat [sic] there and marked your ballot and put it in the receptacle in the corner of the room as well as I recall. [Tr. 423.]

On cross-examination, Walker gave the following testimony:

> Q. During the poll, when you first walked in there what was it that you recall . . . that the attorney, Mr. Johnson, said to you?
>
> A. I believe that he held up this paper and was explaining the voting procedure the best I can remember now. I don't remember anything verbatim of what he said. But he had the paper. He was there. I remember seeing him standing in the side of the building there.
>
> . . . .
>
> Q. You already knew. So you weren't paying very much attention to what he was saying?
>
> A. Right.
>
> Q. And can you tell me to the best of your recollection what it is that you do recall him saying?
>
> A. I do recall that he said there wouldn't be any repercussions and that he went through the instructions down there. I remember him saying it wouldn't be any repercussions from this – the Union or the Management as to how you voted, you know.
>
> Q. Do you recall him saying anything else?

A. Yes, he said some other things, but I don't recall. [Tr. 424, 425, and 426.]

Walker further testified on cross-examination that he gave an affidavit to the Board on May 2; that there is nothing in his affidavit to the Board about repercussions or harassment or intimidation; that he did not recall Melton being in the voting area; that Yancey was in the voting area; that in his aforementioned affidavit to the Board he indicated that he did not see Yancey in the voting area; that just before he testified at the trial herein Respondents' attorney, Milam, told him, "that they wanted to know about the polling." (Tr. 432.)

According to his testimony, on the morning of March 24 Hardman sent Melton a letter (a) demanding recognition and asking them to schedule some time for meetings to start contract negotiations, and (b) requesting information. (GC Exh. 8). The letter reads as follows:

March 24, 2005

Via Facsimile to 662/226-1166
& Certified Mail, Return Receipt Requested

Mr. Chet Melton
Vice President
Grenada Manufacturing
Acquisition Corporation
635 Highway 332
Grenada, MS 38901

Re: Grenada Manufacturing Acquisition Corp. and United Steelworkers of America

Dear Mr. Melton:

Grenada Manufacturing Acquisition Corporation ("GMAC") recently acquired the assets of Grenada Manufacturing, LLC ("GML"). The United Steelworkers of America, AFL-CIO-CLC ("USWA") was the bargaining agent of the employees of GML. GMAC has hired a substantial and representative complement of its workforce and is engaging in substantially normal operations. The vast majority of GMAC's bargaining unit employees had been employed by GML. As such, GMAC is the successor employer to GML.

By this letter, the USWA demands that GMAC recognize it as the exclusive representative of those employees who are employed within the same jobs as had been included with the GML bargaining unit. Please contact me as soon as possible to schedule a meeting to commence bargaining.

In order to prepare for bargaining, the USWA demands the following:

1. A listing of all bargaining unit employees presently employed by GMAC, including the names, addresses, dates of hire, and job titles held by each employee.

2. A listing of all supervisory and management employees employed by GMAC at the Grenada plant.

3. A detailed description of the terms and conditions of employment, including wages and benefits, presently provided by GMAC to the hourly employees of the Grenada plant.

4. A description of any plan that GMAC presently has to hire additional employees at the Grenada plant.

The USWA reserves the right to amend this information request.

Very truly yours,

Isaac (Fat) Hardman
Staff Representative

Hardman testified that the Company never provided the information he requested. On cross-examination, Hardman testified that he did not protest the poll in his March 24 letter because he thought the poll was illegal, he did not think he had to protest it, and Ice had committed to bargain with the Union so that is what he addressed; that he did not try to telephone anyone at the involved Grenada facility on the morning of March 24 regarding wanting his own people at the poll, which began at 7 a.m.; and that the only relevant unfair labor practice charges that he was aware of were filed after the poll.

General Counsel's Exhibit 9 reads as follows:

ICE INDUSTRIES

3/30/2005

. . . .

Dear Mr. Hardman,

The Collective Bargaining Agreement between Grenada Manufacturing, LLC and the United Steelworkers of America (USWA) union expired on February 23, 2005. On March 10, 2005 Bankruptcy Judge David Houston entered an order approving the sale of all assets of Grenada Manufacturing LLC to Grenada Acquisition Corporation (GMAC) and GMAC did not assume any obligations of the former company under the collective bargaining agreement.

Numerous employees made GMAC aware that they no longer wished to be represented by the union. For this and other reasons, a poll of all employees was conducted on March 24, 2005 and over sixty percent of the employees in the bargaining unit indicated they no longer wished to be represented by the union. Accordingly, GMAC has solid evidence that the majority of our employees do not wish to be represented by the union and GMAC declines to recognize the USWA as the exclusive bargaining agent for its employees.

Sincerely yours,

Chet Melton

With a cover letter dated March 30 (GC Exh. 26), Johnson submitted his invoice, dated March 28, to GML, attention Anderson, for $1,200 for 8 hours of service rendered on March 24, namely, monitoring, counting, and a detailed report on all activity relating to the process.

Lumbrezer testified that Respondent's Exhibit 36 is the Bill of Sale between GML and GMAC; that they were able to execute this transaction because the Bankruptcy oOrder [sic] had permitted it; and that the date of the document, "3-30-05," is the accurate date on which GMAC took over the company. Anderson signed the document as general manager of GML.

General Counsel's Exhibit 39 reads as follows:

NOTICE

UNION DUES WILL NO LONGER BE WITHHELD FROM THE PAYCHECKS EFFECTIVE WITH THE CHECK YOU RECEIVE THIS WEEK.

CHET
3-31-05

Melton testified that this notice was part of the Company's response to the results of the poll; and that management also issued fairly prompt refunds to employees of dues that had been withheld since the date of the poll.

On cross-examination, Collins testified that he had a conversation with Gary Houston about the dues checkoff and Houston told him that it was illegal for

the Company to take out dues with a contract that expired.

When called by the Respondents, Anderson testified that the Company ceased collecting dues because it no longer had a contract with the Union and it did not feel it had the right to deduct those moneys from an employee's paycheck. On cross-examination, Anderson testified that refunds were promptly made to employees for over withholding dues out of their paycheck; and that, as demonstrated by General Counsel's Exhibit 41, GML was negligent and tardy in remitting dues GML had deducted from employees' paychecks to the Union.[15]

Gary Houston testified that after the conclusion of the bankruptcy proceeding in March 2005 he, with Melton and Stanford, conducted employee meetings for the purpose of informing the employees of some changes that Grenada Stamping intended to make concerning their terms and conditions of employment; that GMAC assumed the name of GSA around the time of the bankruptcy conclusion; that the employees were told that they had to fill out applications

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[15] P. 2 of GC Exh. 41 indicates that as of "10/01/2004" the Union had a claim against GML for $16,985.54. Anderson testified that the money was deducted from the employees' paychecks, it was deposited into GML's bank account, and it was not remitted to the Union in a timely fashion. Anderson also testified that he was not in a position to testify that this indebtedness was ever satisfied but he was aware that payments were periodically made to the Union.

to become employees of GSA; and that the day after the sale of GML was approved he had a meeting with the employees at the Grenada facility and told them that everyone was going to be retained.

By check dated April 1 (GC Exh. 25), Grenada Acquisition Corporation paid Johnson the $1,200.

In response to questions of Respondent's attorney, Melton, testified that on April 1 the employees of GML transferred to Grenada Manufacturing and Stamping; and that is also the time when his paycheck changed. On cross-examination, Melton, in effect, testified that he was not able to recollect what entity was paying him between February 2004 and April 1, 2005. As noted above, Melton at one point testified that from the time the Management Agreement went into effect through the end of 2004 he was paid by checks of Grenada Manufacturing Acquisition Corporation.

When called by the Respondents, Anderson testified that the involved employees were employees of GML until the final Bill of Sale was executed between GML and GSA on March 30.

When called by Respondents, Melton testified that after GSA took over on or about April 1, the new Company introduced new personnel policies and procedures (R. Exh. 42); and that each page of the policy was posted shortly after April 1 on one of the main bulletin boards where they remained for 30 days.

On April 2, Melton called Paige out back at work and told him that someone had said that his attitude had changed and he was now discussing union business on the floor. Paige testified that Melton also told him that if Gary Houston knew, he probably would be disciplined and could be dismissed. On cross-examination, Paige testified that Melton said that one employee felt that Paige was threatening and harassing him but Melton did not tell him who the employee was; that since he had not talked to employees about the Union on the floor, he himself felt threatened by Melton's comments; and that Melton did not give him a written warning or any discipline.

When called by the Respondents, Melton testified that he met with Paige on April 2 because he had several people complain that they felt like they were being harassed by Paige talking to them on the job[16]; that he told Paige that the Company could not have anybody harassing anyone in the workplace, and the Company had longstanding rules against that; that this meeting took place just outside of Paige's department; that he did not threaten or discipline Paige; and that Respondent's Exhibit 43 is a copy of the email he sent to Gary Houston, Stanford, and Anderson regarding this meeting. Respondent's Exhibit 43 reads as follows:

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[16] Respondents did not call the alleged complainants, namely Tony Burt, Wyodia Bland, Stanley Booker, and George Bullins, to testify at the trial herein.

Due to comments received from some employees, I held a conversation with Bennie this morning. . . . I told Bennie there have been comments from employees that he has been making statements concerning the Union situation while at work and has made them feel uncomfortable. I reminded him "as a friend" that we cannot have our employees feeling uncomfortable at work due to comments or actions by another employee. People should be able to come to work, do their work and not feel in any way ill at ease or uncomfortable.

He told me that he had not been doing anything like that at work and he does know the rules on doing so. He did admit that Wyodia Bland had approached him but Bennie says he told Wyodia that he was not going to talk to him about anything. He also mentioned a conversation that he and George Bullins had when George made the statement that the company seemed to do really good for the folks. Bennie asked him in what respects he was talking about and George told him the vacation thing. Bennie said the company really didn't do anything except change the vacation from June to January – and they already had 4 weeks vacation, so nothing really changed.

I again told Bennie that we believe, and in particular Gary, strongly that people should be comfortable at work and even though he thinks a lot of Bennie, he will not put up with people, either members or not,

> coming to him about comments another employee made that made them feel uncomfortable while at work.

On April 21 Paige met with Anderson and Melton in Melton's office. Paige testified that Melton told him that they needed his help to stop talking union business on the floor; that Melton told him that he had talked to him prior to this and that if this is going on, they need it to stop; that it was his understanding after this meeting that he could not talk about union business on the floor; that he told them that he talked to a couple of people but he did not think it was about union business; and that he was not aware that the Company, prior to his April 21 conversation, restricted any other employee topics in the past. On cross-examination, Paige testified that Melton said that he had talked to me before and it had come up again; that Melton said that he needed my help to stop it if it was still going on; that he was not talking to anyone about union business, he was a department leader, and he had to talk to people to instruct them on what to do; that throughout his tenure with the Union he had never discussed union business on the floor; and that while he was aware of GML's solicitation and distribution policy (R. Exh. 45), he did not discuss union business on the floor out of respect for the Company.[17]

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[17] GML's policies and procedures manual, adopted "8-99" includes the following:

(Continued on following page)

Collins testified that at the April 21 meeting Melton told him that he did not want him talking anything about the Union or the past, and if anybody asked him anything about these issues, he should send those people to Melton; that he told Melton that he never discussed union business on the floor but if someone asked him a union-related question, he would answer it; that Anderson told him that he "could no longer talk about Union business on the floor since ICE Industries had bought the Company" (Tr. 293); that Melton said that the employees could talk about the job or any casual conversation; that Melton told him that he had to be careful because somebody might be trying to set him up by coming up there and telling him something he, Collins, said; and that he felt threatened in that they kept insisting that he not discuss the Union on the floor and they mentioned retaliation.

On cross-examination, Collins testified that if someone asked him a question about the Union he would answer it even if it was during working times; that he did not consider answering such a question during working time to be a violation of the

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B. SOLICITATIONS AND DISTRIBUTION

Organizational work in behalf of or in solicitation for membership in any organization may not be conducted or participated in during working time by any employee. Any such activities must be limited to breaks or other periods outside scheduled working time.

no-solicitation distribution rule; and that it was the policy of the union leadership not to discuss union business in the plant but to discuss it at the union hall or outside the plant, and this was done for a number of years.

On redirect, Collins testified that he understood that the Company did not want employees conducting union business while they were on the clock; and that prior to the above-described April 21 meeting he did not believe that the rule against conducting union business would apply just to answering a quick question from someone or talking about the Union just in a passing reference, something very short.

When called by Respondents, Melton testified that he called the late April 2005 meeting because he felt that Paige needed a friendly reminder that the new Company had taken over, the employees did not have a Union at that point in time, and all matters relating to employees should be referred to him; and that he told Paige again about the no-solicitation rule.

Gary Houston testified that sometime prior to June 2005 he held a meeting with employees in which announcements were made concerning changes to employee health benefits which increased certain prescription copayments, changed health insurance providers, and included dental coverage; that a 401(k) plan was established; that General Counsel's Exhibit 36 is a notice of a meeting which was held on April 14; that he did not have a recollection of a meeting

prior to April 14 where employees were informed of the change in health coverage; that General Counsel's Exhibit 37 is a notice of an April 7 meeting on the new 401(k), and he did not recall a prior meeting on this subject; that that General Counsel's Exhibit 35 is a notice of an April 19 meeting on ICE Industries Voluntary Retirement Plan, and he did not recall a prior meeting of the employees at the Grenada facility on this subject; that in April 2005 employees were advised at a meeting that there would be changes concerning their vacation year and vacation pay rates; that the vacation year was changed from a fiscal year to a calendar year; that he did not think that there was a change in the amount of vacation pay an employee would receive; that in April 2005 GSA ceased following the grievance procedure that had existed prior to that time and instead had an open door policy, and he did not believe that a meeting was held with employees regarding this; that he remembered a meeting where employees were told that from that time forward there would only be an open door policy but grievances were never discussed at this meeting where the results of the poll were discussed, which meeting was held within a week of the poll; that he did not know if he ever said anything about an open door policy and he did not recall being present when another manager referenced the open door policy; and that around April 24 the union bulletin board which had been maintained in the Grenada facility was removed.

Paige testified that he took 1 week of vacation in June 2005; that he was paid 40 hours of his hourly rate; that this was not how vacation pay was calculated before April 1 in that before April 1 he would receive 8 percent of his annual earned income; that the 40 hours of pay meant that he was paid $200 less than then he had been paid before April 1; and that if an employee worked 15 or more years, he received 4 weeks of vacation at 8 percent of his annual earned income.

Gary Houston testified that General Counsel's Exhibit 34, which is a Grenada Stamping and Assembly, Inc. management staff organizational chart issued September 14, 2005, looks accurate. The chart lists Gary Houston as general manager, Stanford as manufacturing manager, and Melton as human resources.

Gary Houston testified that around December 1 he was actually hired by ICE Industries. Before that he was paid by ICE Industries as a consultant.

Analysis

Paragraph 11 of the complaint alleges that on March 24, 2005, Respondents, by an unnamed attorney, at Respondents' facility, interrogated Respondents' employees about their union sympathies by conducting a poll.

In his opening, counsel for the General Counsel William LeMaster made the following statement:

> Although *we concede that GMAC had a good faith uncertainty when it conducted the poll,* the evidence will show that the poll was nonetheless illegal because the Employer failed to adhere to the safeguards set forth in *Struksnes Construction*, [165 NLRB 1062 (1967),] when it conducted the poll on March 24, 2005. [Tr. 25, 26; and emphasis added.]

Struksnes Construction Co., supra at 1063 indicates as follows:

> Absent unusual circumstances, the polling of employees by an employer will be violative or [sic] Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of the Union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Counsel for the General Counsel contends that Respondent failed to comply with the last three above-described *Struksnes* safeguards; that assurances against reprisals were not given either by the notice of the polling or by supervisors; that Johnson acknowledged that the language he used was intended for the time the employees were in the

cafeteria voting; that to the extent that Kendall's and Walker's testimony might be interpreted to be contrary to that of Johnson, such testimony is not credible because Kendall was not a reliable witness in that, contrary to his assertion, he did not vote with Paige, and Walker's testimony is not supported by his own affidavit to the Board; that whether GSA succeeded in coercing or intimidating voters is not the standard; that the standard is the objective standard of whether it tends to interfere with the exercise of employee rights under the Act, *Desert Toyota,* 346 NLRB No. 4, slip op. at 14 (2005); that the presence of Human Resources Manager Melton and agent Johnson in the voting area during the entire voting process created an inherently coercive atmosphere and did not allow for a secret ballot vote of the employees to occur; that the Board has concluded that the presence of a high-ranking manager in the polling area is inherently coercive, *Helnick Corp.* 301 NLRB 128 (1991), and *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982); that Melton's presence is the epitome of coercive; that Johnson, an agent of Respondent during the poll, was in a position to see employees vote and to have interfered with the secrecy of the ballot; that Grenada Stamping violated Section 8(a)(5) when it failed to provide the Union with reasonable advance notice of the poll; that in *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1063 (1989), enfd. in relevant part and remanded 923 F.2d 398 (5th Cir. 1991), rehearing denied 931 F.2d 892 (5th Cir. 1991), the Board added a requirement that the employer provide the union with reasonable advance notice of the time

and place of a poll; that here while Grenada Stamping waited until the last possible second before notifying the Union, it made arrangements with Johnson about 1 week in advance of the poll; that reasonable advance notice gives the incumbent Union an opportunity to review the polling arrangements with Respondent, to be present when the ballot box is opened and the votes counted, and to allow the Union to suggest names of employees to be observers during the poll; that Respondent also misled the Union about the potential consequences of the poll; that Respondent apparently wanted to rush the poll in order to ensure that the Union did not have an opportunity to affect the results; and that the key word in the requirement set forth in *Texas Petrochemicals Corp.*, supra, is "reasonable."

The Charging Party on brief contends that an employer violates Section 8(a)(1) when it fails to comply with any one of the safeguards set forth in *Struksnes*, supra; *Roanwell Corp.*, 293 NLRB 20, 23 (1989); and *Montgomery Ward & Co.*, 210 NLRB 717, 724 (1974); that a poll is presumed to be violative of the Act and the burden is upon the employer to establish that he has observed all of the safeguards and falls within the exception of *Struksnes*, supra; and that whether GMAC became GML's successor at the time of the Management Agreement, or at the time of the intermingling of funds, or at the time of the polling, or at the time of the sale is of no import; a duty to bargain with the Union attached to GML during each of these dates and hence to GMAC.

Respondents on brief argue that since under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), an employer is no longer permitted to withdraw recognition on the same basis as it could poll its employees and the Board has specified a higher standard of proof to support a withdrawal of recognition, polls are now one of the few methods by which employers can confirm reasonable doubt of a union majority status; that despite the Board's presumption against polling, the Board has failed to outline specific procedures for conducting a poll which are similar to those used in a representation election; that "*the Board's failure to address these issues should allow the employers reasonable license in interpreting the few safeguards the Board has created in the form of Struksnes,* [supra,] *and Texas Petrochemicals,* [supra]" (R. Br. 4) (emphasis added); that the Company provided adequate assurances against reprisal to the bargaining unit employees; that the notice of the polling, General Counsel's Exhibit 7 "*directly implied*" (id. at 6) (emphasis added) that employees who wished to vote could vote and employees who did not wish to vote were free to do so as well with the language "After all employees who wish to vote have [voted]. . . ."; that Johnson provided further assurances against reprisal to employees; that Walker testified that Johnson said that there would be "[n]o repercussions from the Company which way you voted, Didn't matter." (Tr. 423); that Kendall testified that Johnson said, "[t]hat wasn't nobody putting you under any pressure to vote or not to vote. That was entirely up to you to vote or not to vote." (Tr. 407);

that a speech to employees by a local attorney hired to conduct poll which informed the employees that they could vote however you please and that no reprisals would be taken against them was not coercive and offered adequate assurances against reprisals under *Struksnes*, supra, *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 867-869 (6th Cir. 1982); that no acts of reprisal or intimidation were taken against employees by the company during the voting or afterwards; that the employees were polled by secret ballot; that the ballot box was controlled by Johnson at all times, except for a brief period of time between shifts when the locked and sealed box was stored in a locked office; that while there were no curtains or dividers at each voting table, Johnson situated the voting tables so that the employees' voting would take place out of the sight of management and fellow employees; that the employer had not engaged in any unfair labor practice or otherwise created a coercive atmosphere at the time the poll was conducted; that the Union was provided with advance notice of the poll in accordance with the requirements of *Texas Petrochemicals Corp.*, supra; that "Respondents submit the notice was reasonable under the circumstances because advance notice was provided *soon after* the company decided to poll the employees in mid-March" (R. Br. 13) (emphasis added); that the Board has found advance notice of a poll 1 day prior to the poll to be permissible, *Boaz Carpet Yarns*, 280 NLRB 40, 44 (1986), and *Hutchinson-Hayes International, Inc.*, 264 NLRB 1300, 1308 (1982); that the Union suffered no harm or prejudice

from the fact that they were told on March 23 that a poll was going to be conducted on March 24; and that the Union was given the opportunity to object to and/or participate in the polling, but union officials deferred.

In my opinion, the involved poll was unlawful because it was not conducted in accordance with the requirements of *Struksnes*, supra, and *Texas Petrochemical*, supra. The poll was conducted after the bankruptcy judge approved the selling of GML and before the Bill of Sale was signed. Lumbrezer testified that every contract that customers and vendors had with GML was voided because ICE Industries *did not want to be bound by anything*. On March 4, 2004, GMAC signed an agreement with the Union specifying that "[t]he company will negotiate a contract with current union representative after the completion of the Purchase Agreement." But once the bankruptcy judge approved the selling of GML, GMAC wanted to void any obligation to the Union before finalizing the purchase. Although having to deal with the Union was not cited by Respondents' witnesses as a deal breaker, Lumbrezer testified that ICE Industries could have walked away from the deal at any time before it was finalized. Respondents wanted to have all the ducks in a row and take care of all the ducks before the deal was finalized. And as demonstrated by the way they conducted the poll, Respondent's wanted to make sure of its outcome.

Judge Herbert Silberman, in *Montgomery Ward & Co.*, 210 NLRB 717, 724-725 (1974), pointed out as follows:

> From the early days of the Act the Board has looked with disfavor upon employer sponsored elections. [Footnote omitted.] A poll of employees by their employer as to whether they wish to be represented by a labor organization is an intrusion upon the employees' statutory right to select a collective bargaining representative without employer interference.
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> . . . .
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> As a poll is presumed to be violative of the Act, the *burden is upon the employer to establish that it has observed all of the required safeguards* and falls within DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD 26 the exception approved in *Struksnes*. [Citations omitted.] [Emphasis added.]
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> . . . .
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> [a successor] asking employees to declare themselves in a poll with respect to their desires for continued union representation at a time when they are applying for employment inherently restrains and coerces employees in the exercise of their rights under the Act.

Judge Silberman's opinion was adopted by the Board.

In *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1061, 1064 (1989), which involved a successor and a union which had a collective-bargaining agreement with the predecessor and was recognized by the successor, the Board indicated as follows:

> While we require, then, that employer polls be predicated on the same evidentiary basis as Board conducted RM elections, we do not go so far as to require that such polls be conducted with the same extensive procedural formalities as those that accompany Board elections.[18] To impose such procedural requirements on in-house employer polls would, in all likelihood, effectively do away with such polls – a result which we do not seek. While we favor reliance on a Board-conducted RM election rather than an employer's own in-house poll, we nevertheless acknowledge an employer's right to conduct such a poll on the basis of a reasonable doubt about an incumbent union's majority status.

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[18] The Board's extensive procedures for the conduct of representation elections, including RM elections conducted under Sec. 9(c)(1)(B) are set forth in detail in the Board's Casehandling Manual for Representation [P]roceedings (Part Two), [S]ecs. 11300-11350. In addition to the general oversight expertise provided by the Board as a neutral party, some of the more significant other procedural safeguards of Board elections that are unlikely to be found in employer polls are voter eligibility lists; posted election notices; reasonable periods of time for discussion of issues and campaigning; election observers from all participating parties; procedures to challenge voter eligibility; procedures to file exceptions to the election or to conduct affecting the results of the election.

> Although some procedural refinements must be foregone in the interest of effectively preserving an employer's right to poll, we shall nevertheless require, at a minimum, that an employer provide the union with *reasonable advance notice* of the time and place of the poll, and that the poll itself be conducted in accordance with the procedural safeguards set forth in *Struksnes Construction Co.*, supra[19].
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> . . . .
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> Moreover, imposition of a *procedurally stringent requirement* that an employer provide a union with *reasonable advance notice* of such polls is consistent with our imposition . . . of the substantively more stringent 'reasonable doubt' standard for conducting such polls in the first place. [Emphasis added.]

In *Texas Petrochemical Corp.*, 923 F.2d 398, 403 (5th Cir. 1991), the court pointed out as follows:

> We find it significant that TPC [Texan Petrochemical Corporation] failed to notify the Union of the poll. *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981), clearly states that polling would be tolerated if there was objective evidence of loss of

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[19] We have accepted the general adequacy of the *Struksnes* procedural safeguards for employer-conducted polls of employees where the employer has reasonable doubt about the incumbent union's majority status. [Citations omitted.]

union support and "after giving notice to the union." Id. at 1145 [Footnote omitted.] As we previously stated, an employer may turn to avenues other than those sponsored by the Board but there must be some similarity with Board procedure. To allow otherwise would invite abuse. *Struksnes* . . . deals with employer polling before a certification election. In those situations, polling would occur when the union is in close contact with the employees and information is being disseminated earnestly. In a post-certification election, a union may not be in as close contact with its members. We do not seek to reward unions who are alien to their members, but are reminded of the consequences of this poll; in a *blitzkrieg* effort an employer could rid itself of a low profile, majority union. [Footnote omitted.] Advance notice is particularly important when a successor employer seeks to poll its employees shortly after taking over the company and contemplates negotiating with the union. See *Fall River*, 482 U.S. 39, 40, 107 S. Ct. at 2233, 2234 (explaining employees of successor employers may feel their jobs may depend upon non-union workplace). When the NLRB holds an election, be it certification or decertification, there is a period of time in which both the union and the employer are able to present their side of the issues; advance notice would provide similar benefits when the NLRB is not involved.

In the instant case the situation was worse in that from a timing standpoint the Respondents were polling the employees not only at about the same time they would be seeking jobs from the successor if the purchase was finalized but at a time when ICE Industries could still walk away from the purchase, which inevitability would have lead to the closing of the facility and the loss of all of the jobs.

The situation figuratively screamed out for caution, and Respondents, at best, threw caution to the wind. More accurately, Respondents thumbed their noses at a reasonable and lawful approach. There was no lawful reason for Melton to be in the polling area the entire time of the voting. And it would have been so easy for Respondents to have given the employees an unequivocal assurance against reprisal. The basic requirements regarding employer polling have been around for years. Yet on brief Respondents argue that the Board has failed to outline specific procedures for conducting an employer poll and that the Board should allow the employers reasonable license in interpreting the few safeguards the Board created in *Struksnes*, supra. Notwithstanding that the safeguards are few, Respondents still refused to comply with them.

As indicated above, Judge Silberman pointed out in *Montgomery Ward & Co.*, 210 NLRB 717, 724 (1974):

> As a poll [by an employer] is presumed to be violative of the Act, the *burden is upon the*

> *employer to establish that it has observed all of the required safeguards* and falls within the exception approved in *Struksnes*. [Citations omitted and emphasis added.]

Did Respondents meet their burden to show assurances against reprisal were given to employees? Respondents argue that the notice of the polling (GC Exh. 7) directly implied that employees who wished to vote and employees who did not wish to vote were free to do so as well with the language "After all employees who wish to vote have [voted]. . . ." Of the four employees Respondents called to testify about the employer polling, Seals did not testify that he saw the notice before he went to vote, Clark testified that he was not sure that he read the notice before he voted, Kendall incredibly testified that the notice was posted for about 1 week before the voting when Respondents' evidence shows that it was posted for the first time less than 24 hours before the voting began, and Walker did not specifically testify about the notice. So two of the employees called by Respondents said nothing about the notice, one was not sure he read it before the voting, and one incredibly testified that it was posted for a week before the voting. General Counsel's witness Collins testified that he saw the notice as he was leaving the building on March 23. But unlike the other employees, Collins was shown a copy of the notice at his meeting with Anderson and Melton, and Collins was told that the notice was going to be posted later that day. Collins had reason to look for the notice. Other employees had not been given a reason to look for the notice at the end of the day on

March 23. Considering the fact that the notice was posted less than 24 hours before the voting began, Respondents have not shown with credible evidence that, other than Collins, any employee even saw the notice before the voting commenced. Again, with respect to compliance with the requirements, the burden is on the Respondents and not the General Counsel.

Respondents argue that Johnson provided further assurances against reprisals to employees. As noted above, Johnson testified that he told the employees that

> I was a local attorney and that I was overseeing the voting process to make sure that no one was harassed or intimidated. I also explained to them that I am not affiliated with Grenada Manufacturing whatsoever and that I didn't have an interest in the outcome of the results of the voting. [Tr. 65.]
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> . . . .
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> I was here to ensure that there were no harassments or intimidation. That any one – that no one was intimidated or harassed *during the process* to make sure that the voting process ran smoothly and it was a fair process. [Tr. 74; emphasis added.]

Moreover, Johnson testified that his statements to employees concerning his assurance that there would be no harassment or no coercion of the employees voting pertained only to the time that the employees

were present and actually voting in the cafeteria because he was only there for that particular day. Respondents have not shown with the testimony of Johnson that they complied with the requirement that assurances against reprisal were given.

With respect to Kendall and Walker, neither one of these witnesses was credible.[2018] They figuratively put words in Johnson's mouth that even he did not testify he said. As noted above, Kendall was the employee who testified that the notice of the voting was posted for about 1 week when the evidence demonstrates that it was posted less than 24 hours before the beginning of the voting. Walker's affidavit to the Board does not support his testimony. Indeed according to Walker's affidavit, neither Melton nor Yancey was present in the cafeteria when he voted. That being the case one must wonder, with Walker's version of events, who supposedly checked off his name on the employee roster (R. Exh. 39), and whether Walker was even present during the voting. Respondents have not shown with the noncredited testimony of Kendall and Walker that they complied with the requirement that assurances against reprisal were given.

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[18] At p. 8 of their brief, Respondents argue that Kendall and Walker "were on the union negotiating committee." Kendall testified that he resigned from the Union 10 years ago. Walker testified that he was a member of the Union two different times and on the last round he was on negotiating committee. Walker was not asked if he was a member of the Union when he voted on March 24.

As noted above, on brief the General Counsel contends that the presence of Human Resources Manager Melton and agent Johnson in the voting area during the entire voting process created an inherently coercive atmosphere and did not allow for a secret-ballot vote of the employees to occur; that the Board has concluded that the presence of a high-ranking manager in the polling area is inherently coercive, *Helnick Corp.*, 301 NLRB 128 (1991), and *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982); that Melton's presence is the epitome of coercive; and that Johnson, an agent of Respondent during the poll, was in a position to see employees vote and to have interfered with the secrecy of the ballot. The General Counsel is correct. I see no need to expand on the General Counsel's conclusions. Again,

> As a poll [by an employer] is presumed to be violative of the Act, the *burden is upon the employer to establish that it has observed all of the required safeguards* and falls within the exception approved in *Struksnes*. [Citations omitted and emphasis added.]

Respondents have not shown that they observed all of the required safeguards of *Struksnes*, supra.

As noted above, on brief Respondents argue that "the notice was reasonable under the circumstances because advance notice was provided [on March 23] *soon after* the company decided to poll the employees in mid-March" (R. Br. 13) (emphasis added). This argument, at best, is disingenuous on its face. The Board, as set forth in *Texas Petrochemicals Corp.*, 296

NLRB at 1061, concluded that "we shall . . . require, at a minimum, that an employer provide the union with *reasonable advance notice* of the time and place of the poll, and that the poll itself be conducted in accordance with the procedural safeguards set forth in *Struksnes Construction Co.*, supra." As concluded above, the poll was not conducted in accordance with the procedural safeguards set forth in *Struksnes Construction Co.*, supra. Was reasonable advance notice given to the Union? Also as noted above, the court in *Texas Petrochemical Corp.*, 923 F.2d 398, 403 (5th Cir. 1991), concluded that

> In a post-certification election, a union may not be in as close contact with its members. We do not seek to reward unions who are alien to their members, but are reminded of the consequences of this poll; in a *blitzkrieg* effort an employer could rid itself of a low profile, majority union. [Footnote omitted.] Advance notice is particularly important when a successor employer seeks to poll its employees shortly after taking over the company and contemplates negotiating with the union. See *Fall River*, 482 U.S. 39, 40, 107 S. Ct. at 2233, 2234 (explaining employees of successor employers may feel their jobs may depend upon nonunion workplace). When the NLRB holds an election, be it certification or decertification, there is a period of time in which both the union and the employer are able to present their side of the issues; advance notice would provide similar benefits when the NLRB is not involved.

Did the circumstances involved here preclude giving reasonable advance notice? Did the circumstances dictate that Respondents notify the Union less than 24 hours before the poll began? Respondents notified Johnson about 1 week before the poll. Respondents also could have notified the Union about 1 week before the poll. Respondents chose not to. Why? Perhaps the reason can be gleaned from the fact that Anderson and Melton on March 23, the day before the poll, intentionally tried to mislead Paige and Melton about the potential consequences of the poll while giving the Union its notification of the poll. Respondents resolved that it would not serve what they perceived to be in their best self interests to play fairly. Under the circumstances existing here, Respondents did not provide the Union with reasonable advance notice of the poll.[2119] The poll was unlawful.

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[19] As noted, on brief Respondents argue that that the Board has found advance notice of a poll one day prior to the poll to be permissible, *Boaz Carpet Yarns*, 280 NLRB 40, 44 (1986), and *Hutchinson-Hayes International, Inc.*, 264 NLRB 1300, 1308 (1982). Regarding the former citation, it should be noted that this case, which was decided by Chairman Dotson and Members Dennis and Johanson (concurring and dissenting in part), was decided in 1986, 3 years before the Board's decision in *Texas Petrochemical Corp.*, supra; that there the poll was conducted to ascertain the truth of the employees' own claim made by a decertification petition signed by 97 of the 130 to 140 employees in the unit; that the announcement of the poll assured employees there would be no reprisal regardless of the outcome of the poll; that the poll was conducted by secret ballot; and that the poll was conducted without infringing upon the employees' Sec. 7 rights. That case is distinguishable from the one at hand. Regarding the latter citation, it is noted that it too was decided

(Continued on following page)

Respondent violated the Act as alleged in paragraph 11 of the complaint.

Paragraphs 12(a) and (b) of the complaint collectively allege that about March 24, 2005, the Union, by letter, requested that Respondent Grenada Stamping recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit, and since about March 30, 2005, Respondent Grenada Stamping has failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the unit.

Counsel for the General Counsel on brief contends that Grenada Stamping became a successor to GML about March 4, 2004; that a purchaser has the duty to continue the bargaining relationship established by its predecessor when there is substantial continuity in the employing enterprise, *Fall River*

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before the Board's decision in *Texas Petrochemical Corp.*, supra; that Judge Jerrold Shapiro concluded, which conclusions were affirmed by the Board, that he could not find that the respondent therein entertained a reasonably based doubt of the union's majority status when it conducted the poll and therefore the poll was unlawful; that he did not make findings regarding whether conduct involved in that proceeding created a coercive atmosphere and/or violated the secrecy of the ballots; and that the respondent in that proceeding did not give notice to the union of its intention to poll the employees prior to conducting the poll as required in *NLRB v. A. W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981). The latter case is not only distinguishable, it does not support Respondents' argument.

Dyeing Corp. v. NLRB, 482 U.S. 27, 42-46 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Specialty Envelope Co.*, 321 NLRB 828 (1996), enfd. in relevant part 153 F. 3d 289 (6th Cir. 1998); that the Board has held that a prospective purchaser who effectively controls the business operations while the sale is pending will have successor bargaining obligations even though the sale is not yet final and title to the assets has not passed to the purchaser, especially if there is a management agreement between the predecessor employer and the purchaser, *Golden Cross Health Care of Fresno*, 314 NLRB 1201 (1994); *Sorrento Hotel*, 266 NLRB 350 (1983); *East Belden Corp.*, 239 NLRB 776, 791 (1978), enfd. mem 634 F.2d 635 (9th Cir. 1980); that in February 2004 Gary Houston was introduced to the involved employees as the new general manager; that Melton and Anderson were subordinate to Gary Houston and followed his directives; that it is undisputed that at the time that Grenada Stamping began the day-to-day management of GML's business operations in early March 2004, there were no significant changes to the employing enterprise in that the work force, jobs, working conditions, supervisors, equipment, and production methods remained essentially unchanged; that the involved management agreement gave broad authority to Grenada Stamping to direct and control the business operations, make all purchases, collect revenues, control all assets, respond to customer complaints, and exercise oversight over the employees, including the sole discretion to hire and fire employees; that Grenada Stamping was also authorized to retain

all net revenues from the business as compensation for its management services; that Howard Ice and Gary Houston communicated with GML's customers and suppliers and worked to retain those relationships during the entire period that the sale of GML's business assets to Grenada Stamping was pending; that Ice and Gary Houston also met with the Union on March 4, 2004, and negotiated a temporary agreement which explicitly provided that it was between the Union and GMAC and was signed by Gary Houston in his capacity as general manager; that Grenada Stamping, through Gary Houston, continued to recognize and negotiate with the Union throughout the rest of that year; that during the 13 months the Management Agreement was in effect, Grenada Stamping funded the business operations to a substantial degree and exercised full managerial control over all aspects of the business, including labor relations matters; that Gary Houston and Lumbrezer were paid directly by ICE Industries and were never employed by GML or paid out of GML funds; that here, as in *East Belden Corp.*, supra, the evidence demonstrates that during the 13 months that the management agreement was in effect, Grenada Stamping exercised full managerial control over GML's business operations and that Grenada Stamping operated the business for its own account, and not for the benefit of GML; that an employer's withdrawal of recognition based on a procedurally deficient poll is tainted and violates Section 8(a)(5) of the Act, *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1061 (1989); and that, therefore, Melton's March 30 denial of the

Union's request to recognize and bargain with it, which denial cited the unlawful March 24 poll, violates Section 8(a)(1) and (5) of the Act.

The Charging Party on brief contends that *Sorrento Hotel*, 266 NLRB 350 (1983), is easily comparable to this case, except that the Grenada debacle has many more items to chose [sic] from to prove successorship.

Respondents on brief argue that following the rule established by *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), GMAC became a successor on or about March 30 when GMAC took over GML's payroll and hired all of GML's former employees after they submitted applications; that while the General Counsel insists that successorship attached to GMAC on March 4, 2004, when it applied to do business in Mississippi, this assertion is contrary to the established principles of successorship and relevant Board precedent which hold that successor status attaches when (a) an [sic] new employer conducts essentially the same business as its predecessor, and (b) a majority of the workers employed in the new business had been employed by its predecessor; that the Management Agreement gave ICE Industries a chance to stop the loss of GML's customers, turn around the business, and conduct due diligence; that GMAC provided approximately $2 million, most of which was unsecured, to keep GML afloat; that, nonetheless, "GML continued to function as a standalone business with the majority of its cash flow coming from its own sales and other sources of

income, such as the sale of its products" (R. Br. 18)[2220]; that all the business was conducted through GML; that GMAC was little more than a conduit for financing from ICE Industries to GML from March 4, 2004, to March 30, 2005; that GMAC did not hire GML's former employees until after GMAC purchased GML's assets on or about March 30, 2005; that during the interim period GMAC remained poised to walk away from the deal, and if it did, it would have taken the new business it had generated for GML; that in *NYP Acquisition Corp.*, 332 NLRB 1041 (2000), which assertedly is strikingly similar to the instant case, the Board rejected the General Counsel's argument that an acquisition company which managed a bankrupt newspaper with an eye towards eventually purchasing the paper became a successor on the date a management agreement was signed; and that

> [t]he Board affirmed the ALJ's decision and, relying on *Fremont Ford Sales*, 148 NLRB

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[20] While Anderson's testimony is cited in support of this conclusion, it is noted that Anderson testified that "[w]e needed the funds from ICE Industries in order to fund the total operations of Grenada Manufacturing, LLC. We could not have – we were not a going concern, and we could not have paid our bills without their funding." (Tr. 373.) Anderson also testified that

> [t]he account, the bank account, is one bank account. And you have funds from customers coming in. And you have funds from scrap metal coming in. And you have funds from ICE Industries coming in. And in that comingling of funds, I can't tell you which money paid this bill and which money paid that bill. I don't know. I certainly couldn't ascertain that. [Tr. 374.]

> 1299, 1301 (1964), held that Acquisition Corp did not become a successor of the Post as of March 29 because there was (1) no written contract of sale of the company and (2) the managing company did not exercise effective control in its own name during a precisely defined management period which will be used to fulfill mere formalities. [*NYP Acquisition Corp.*, 332 NLRB at 1043.]

Respondents further argue that while the Management Agreement in the instant case gave GMAC management control over GML,and contemplated the eventual purchase of GML, GMAC assumed no duty to purchase the assets of GML in February 2004, no sale occurred until March 2005, GMAC did not exercise control of GML in its own name but continued to manage GML as a going concern, and certain considerations, namely (1) the approval of the sale by the Bankruptcy court; (2) potential liability to PBGC; (3) potential liability regarding pre-existing environmental problems; (4) revaluing industrial equipment at market price; and (5) potential liability with respect to a claim for commissions for GML's past and future sales had to be resolved before GMAC could purchase GML; and that because the above-described problems had to be resolved before GMAC could purchase GML, successorship obligations cannot be imposed on GMAC prior to March 30, 2005.

The Respondents rely heavily on the Board's treatment of the Judge's decision in *NYP Acquisition*

Corp., supra at 1043. Indeed, as set forth above, Respondents argue that

> [t]he Board affirmed the ALJ's decision and, relying on *Fremont Ford Sales*, 148 NLRB 1299, 1301 (1964), held that Acquisition Corp did not become a successor of the Post as of March 29 because there was (1) no written contract of sale of the company and (2) the managing company did not exercise effective control in its own name during a precisely defined management period which will be used to fulfill mere formalities. [*NYP Acquisition Corp.*, 332 NLRB at 1043.]

The problem with Respondents' position is that it is altogether wrong. Respondents cite page 1043 of the Board's decision in *NYP Acquisition Corp.* There the majority of the three-member panel of the Board was merely summarizing the judge's findings. Two pages further into the Board's decision, specifically at footnote 14 on page 1045 in *NYP Acquisition Corp.*, the majority of the three-member panel of the Board indicates as follows:

> [14] The judge found that Acquisition while managing the Post continued the Post's operations with the same employee work force doing the same jobs under the same working conditions. Nevertheless, as indicated above, the judge concluded that Acquisition was not a successor employer to the Post under *Fremont Ford*, supra. We have substantial doubts as to the correctness of the judge's finding and the judge's discussion

> of *Fremont Ford* in light of the Board's more recent decision in *Specialty Envelope Co.*, supra [321 NLRB 828 (1996)], which issued shortly before the judge's decision. However, we find it unnecessary to resolve this issue in view of our findings that Holdings was not an alter ego of Acquisition.

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Court indicated as follows:

> In *Burns* [*NLRB v. Burns Security Services*, 406 U.S. 272 (1972)], we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old. . . . Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same job in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. . . . In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as essentially unaltered." [Citations omitted.]

In the instant case, upon assuming control of GML, GMAC continued doing the same job in the same working conditions, having the same production process, and produced the same products for the same

customers as had GML. While between March 4, 2004, and March 30, 2005, GML still owned the Company, this is not dispositive of whether GMAC was a successor during this period.

As pointed out in *Maintenance, Inc.*, 148 NLRB 1299, 1301 (1964), "[t]he critical question . . . [is] whether Respondent continued essentially the same operation with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition at the time Respondent took over." There the Board found successorship even though the new company had not acquired any of the assets or other interests of the predecessor.

In *East Belden Corp.*, 239 NLRB 776 (1978), the Board found successorship where there had not been a transfer of ownership since the respondent there operated the involved restaurant for its own account and the owner had virtually nothing to do with the operation of the restaurant after the respondent took over its operation.

In *Specialty Envelope Co.*, 321 NLRB 828 (1996), enfd. in relevant part 153 F. 3d 289 (6th Cir. 1998), the Board found that a receiver appointed by a state court to manage a failing company's day-to-day operations was an employer and a legal successor to the company whose operations he was running.

Where, as here, there is a Management Agreement under which GMAC took control of the Company, GMAC was functioning as the Employer of GML's employees notwithstanding the fact that GMAC

did not finalize the sale until March 30. While ICE Industries could have walked away from the purchase right up until the time it was finalized, once it took control of the Company (and from the standpoint of employees, there is substantial continuity between the predecessor employer and the successor) it had to abide by the provisions of Section 8(a)(5) of the Act. When GMAC took control of the Company pursuant to the Management Agreement, received authority on or about March 4, 2004, to do business in Mississippi, and retained the Company's employees without substantial change in the unit or the operation, it became legally obligated to recognize and bargain with the Union. Grenada Stamping violated the Act as alleged in paragraph 12 of the complaint.[2321]

Paragraphs 13(a), (b), and (c) collectively allege that on or about March 24, 2005, the Union, by letter, requested that Respondent Grenada Stamping furnish the Union with (1) a listing of all bargaining unit employees presently employed by GMAC, including the names, addresses, dates of hire, and job titles held by each employee; (2) a detailed description of the terms and conditions of employment, including wages and benefits, presently provided by GMAC to

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[21] In the alternative, the General Counsel contends that if Grenada Stamping is found to be a successor as of March 30, it is still liable since the Union filed the charge in Case 26-CA-22031 on March 24 and, therefore, Respondents were aware of the alleged unfair labor practice on March 30 when the sale was finalized and Grenada Stamping refused to recognize the Union.

the hourly employees of the Grenada plant; and (3) a description of any plan that GMAC presently has to hire additional employees at the Grenada plant; that the information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the collective-bargaining representative of the unit; and that since about March 30, 2005, Respondent Grenada Stamping has failed and refused to furnish the Union with the information requested.

Counsel for the General Counsel on brief contends that the information requested in Hardman's March 24 letter pertains to the bargaining unit of Grenada Stamping, and, therefore, is presumptively relevant; that Grenada Stamping admittedly has not provided the requested information to the Union; and that its failure to do so violates Section 8(a)(5) of the Act, *Broadway Volkswagen*, 342 NLRB 1244, 1248 (2004).

Respondents on brief argue that the results of the poll and other objective evidence clearly show that the Union was not in fact supported by the majority of its employees at the time the employer refused to recognize the Union and recognition of the Union was lawfully withdrawn.

Since Respondents have not shown that the incumbent Union has, in fact, lost majority support, *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), Grenada Stamping is obligated to provide the Union, on request, information relevant to the Union's duty as representative of the employees. *NLRB v.*

Acme Industrial Co., 385 U.S. 432, 435-436 (1967). Grenada Stamping does not contest the relevance of the information sought. Rather, Grenada Stamping argues that it does not have a duty to provide the information because it lawfully withdrew recognition. As found above, the poll was unlawful. The information requested by the Union is presumptively relevant because it directly pertains to terms and conditions of employment of the employees represented by the Union. *Crowley Marine Services*, 329 NLRB 1054, 1060 (1999), enfd. 234 F.3d 1295 (D.C. Cir. 2000). Grenada Stamping violated the Act as alleged in paragraph 13 of the complaint.

Paragraphs 14(a) through (i) of the complaint collectively allege that about April 2005 Respondent Grenada Stamping took the following actions regarding its unit employees: (a) changed the health benefits by increasing the costs of certain prescription copayments, changing health insurance providers, and providing dental coverage; (b) implemented a 401(k) plan; (c) implemented a retirement incentive plan; (d) removed the Union's bulletin board from Respondents' facility; (e) changed the vacation year from a fiscal year beginning June 1 of each year to a calendar year; (f) changed employee vacation pay rates; and (g) continued to maintain an open door policy but no longer recognized the grievance procedure; that the actions of Grenada Stamping described above in this paragraph relate to wages, hours, and other terms and conditions of employment and are mandatory subjects for the purpose of collective

bargaining; and that Respondent Grenada Stamping engaged in the conduct described above in this paragraph without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

Counsel for the General Counsel on brief contends that as Grenada Stamping first became successor to GML in March 2004, Grenada Stamping was obligated to notify the Union of these proposed changes and to give the Union the opportunity to bargain before implementing such mandatory subjects of bargaining, *NLRB v. Katz,* 369 U.S. 736 (1962), and *St. Anthony Hospital Systems*, 319 NLRB 46 (1995); that Grenada Stamping admits that it unilaterally made the changes but relies on its defense that it lawfully withdrew recognition from the Union based on the results of the March 24 poll; that since this poll was unlawfully conducted, Grenada Stamping's refusal to recognize the Union based on the results of a procedurally deficient poll is violative of Section 8(a)(5) of the Act; and that even if Grenada Stamping is found to be a successor on March 30, 2005, the unilateral changes were made too late after the employees were hired to constitute part of its initial terms and conditions of employment, *Banknote Corp. of America*, 315 NLRB 1041 (1994).

Respondents on brief concede that Grenada Stamping f/k/a/ GMAC had a duty to bargain with the Union after it purchased the assets of GML, provided the Union represented a majority of the employees in

the bargaining unit. Respondents argue that after GMAC formally purchased the assets of GML pursuant to the bankruptcy court order, it lawfully instituted its own initial terms and conditions of employment, *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987); that prior to the transfer of ownership of the facility, GMAC notified the Union and its employees that all GML employees would have to reapply for a position with GMAC and that GMAC would make changes to the terms and conditions of their employment; that immediately after the plant changed hands, Gary Houston and members of management met with the employees and announce the new terms and conditions of employment; that GMAC never misled the employees or the Union about whether they would be retained without any change in their working conditions; that under *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), an employer may set initial terms (1) if is has not, by tacit inference misled the employees into believing that prior working conditions will remain unchanged, or (2) if it has affirmatively announced its intentions to retain the employees under new employment conditions before or immediately after commencing operations; and that, according to established precedent, Grenada Stamping f/k/a GMAC clearly had the right to set the initial terms of employment.

The United States Supreme Court in *NLRB v. Burns Security Services*, 406 U.S. 272, 294 (1972), held that:

> Although a successor employer is ordinarily free to set the initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees bargaining representative before he fixes terms.

In *Spruce Up Corp.*, supra at 195, the Board held that:

> *Burns* . . . should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours or conditions of employment, [footnote omitted] or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

In the instant case, GMAC was a "perfectly clear" successor to GML. When GMAC took control of the Company on or about March 4, 2004, it retained all of GML's employees without change in their terms and conditions of employment, except to the extent the Union agreed in writing (GC Exh. 3) that the Company did not have to recognize (a) the work 32 rules, seniority or classifications because of the team concept of ICE Industries, and (b) the pension plan as it existed at the time. GMAC has failed to show that it

clearly announced an intent to change the terms and conditions of employment before it was perfectly clear that GMAC intended to employ all of the predecessor's employees.[2422] GMAC was obligated to bargain with the Union before changing employment terms. GMAC memorialized this realization in General Counsel's Exhibit 4 where, after it attempted to unilaterally negate the incentive program – which was a matter covered in the collective-bargaining agreement which was in effect at the time, GMAC entered into a written agreement with the Union to increase base pay rates and shift premiums thereby replacing the incentive program. GMAC could not unilaterally change the terms and conditions of employment without first bargaining with the Union. Grenada Stamping violated the Act as alleged in paragraph 14 of the complaint.[2523]

Paragraph 15 of the complaint alleges that on two occasions on about April 21, 2005, Respondent Grenada Stamping, by Human Resources Manager Chet Melton at Respondent Grenada Stamping's

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[22] The burden is on Respondents to make this showing. The burden is not on the General Counsel.

[23] The General Counsel is correct in the contention that even if Grenada Stamping is found to be a successor on March 30, 2005, the unilateral changes, with perhaps the exception of changing the vacation year from a fiscal year to a calendar year, were made too late after the employees were hired to constitute part of its initial terms and conditions of employment, *Banknote Corp. of America*, supra.

facility, told an employee that they could not discuss the Union at work.

Counsel for the General Counsel on brief contends that Melton's and Anderson's instructions to union officers Collins and Paige on April 21 not to discuss the Union were in violation of the Act, *Frazier Industrial Co.*, 328 NLRB 717 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000); that no testimony of anyone who allegedly complained about Collins was placed on the record; that by suppressing only union talk during working time, the discriminatory character of the employer's rule was obvious, *Emergency One, Inc.*, 306 NLRB 800 (1992); that while an employer can prohibit employees from talking about all subjects not related to work, where employees are forbidden to discuss union topics while they can discuss subjects not related to work, the employer violates the Act, *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Olympic Medical Corp.*, 236 NLRB 1117, 1122 (1978), enfd. 608 F.2d 762 (9th Cir. 1979); *Larid Printing, Inc.*, 264 NLRB 369, 374, 376 (1982); and *Williamette Industries*, 306 NLRB 1010, 1017 (1992); that neither Paige nor Collins were told that any topic but the Union was considered off-limits; that no other topics have been prohibited in the past; and that such a disparate prohibition is a clear violation of Section 8(a)(1) of the Act.

Respondents on brief argue that GML and later GSA had a longstanding no-solicitation rule in place at the facility (R. Exh. 45); that both Paige and Collins were aware of this rule; that rules restricting

solicitation activity during working time are permitted because of the Employer's right to prevent interference with the employees' work; that no adverse action was taken against Paige; that it has not been shown that the no-solicitation rule was applied in a disparate fashion based on Paige's union affiliation; that in *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1219-1220 (2004), the Board held that (a) an employer lawfully disciplined several of its union members under a facially valid no-solicitation rule after receiving numerous complaints from other employees that they were being harassed with talk about union business during working hours; and (b) the employer was only seeking to prevent the solicitation and harassment of other employees – a goal which is fully protected under the law regarding the enforcement of a no-solicitation rule; and that there is no basis to find Grenada Stamping liable for unlawful discrimination under Section 8(a)(3) or disparate enforcement of the no-solicitation rule under Section 8(a)(1) of the Act.

Not only did none of the alleged employee complainants testify to support Melton's allegation about harassment on the part of Paige, but two of them, Bland and Bullins, did not even testify to deny what was in Melton's e-mail (R. Exh. 43).[2624] There it is

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[24] I would not and do not rely on the uncorroborated testimony of Melton who incredibly testified that the idea of taking a poll came up just a very few days before the poll. Johnson was recruited about 1 week before the poll. Melton was trying to

(Continued on following page)

indicated that Paige (a) would not talk with Bland, and (b) only responded to Bullins, stating the obvious, namely that changing the vacation year from a fiscal to a calendar year was meaningless. The conduct of Paige described in Respondent's Exhibit 43, which is not denied by Bland or Bullins, is by no stretch of the imagination a violation of GML's no-solicitation policy or rule. Add to this the fact that Respondents do not even allege that there were any complaints about the president of the Union yet Collins was also told on April 21 not to discuss the Union. As far as Respondents were concerned, they buried the Union and they did not want any negative comments about what the Respondents had done or were doing. How dare someone point out to an unwitting employee, in response to his statement, that his enthusiasm was misplaced and he did not fully appreciate that the change he cited was meaningless. (Indeed it was only later that the full negative impact of the change with respect to vacation pay was realized by employees.) Respondents had no lawful justification for their April 2 and 21 conversations with Paige and their April 21 conversation with Collins. Respondents were in effect promulgating a new rule on April 2 and 21, namely that Paige and Collins were not to say anything about the Union or employee matters during

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jutify [sic] giving the Union less than 24 hours notice when the Respondents gave Johnson about 7 days notice.

working time.[2725] The new rule had nothing to do with solicitation. The new rule was an attempt to intimidate Paige and Collins. Respondents conduct was coercive. It interfered with, restrained, and coerced Paige and Collins in the exercise of rights guaranteed them in Section 7 of the Act.[2826] Respondents violated Section 8(a)(1) of the Act as alleged in paragraphs 15 and 16 of the complaint.[2927]

CONCLUSIONS OF LAW

1. At all material times, each of Respondent Grenada Manufacturing, LLC and Respondent Grenada Stamping and Assembly, Inc. has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[25] At p. 323 of the transcript, Melton indicated that it referred to "all matters related [to] employees or whatever should be referred to me [and not be discussed by Paige or Collins with the employee]."

[26] For the reasons specified by the General Counsel on brief, as set forth above, this new rule is unlawful in that it forbids discussion of union topics while the employees could discuss subjects not related to work. See cases cited by the General Counsel, as set forth above.

[27] The case cited by Respondents, *Washington Fruit & Produce*, supra, is distinguishable in that there, unlike here (1) the complaining employees testified at the trial therein; (2) the union advocates admitted that they solicited support for the union during working time; and (3) the Board concluded that the personal discussions in that proceeding rose to the level solicitation or promotion within the meaning of the admitted facially valid no-solicitation rule in that proceeding.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondents constitute a unit appropriate for purposes of collective bargaining within the meaning of the Section 9(b) of the Act:

> All production and maintenance employees employed by Respondents at Respondents' Grenada, Mississippi facility, but excluding sales, purchasing, personnel department, office clerical and professional employees, guards and supervisors as defined in the Act.

4. Since about September 1999 until about March 3, 2004, based on Section 9(a) of the Act, the Union had been the designated exclusive collective-bargaining representative of the unit employed by Respondent Grenada Manufacturing, LLC.

5. At all times since about March 4, 2004, based on Section 9(a) of the Act, the Union had been the designated exclusive collective-bargaining representative of the unit employed by Respondent Grenada Stamping and Assembly, Inc.

6. By engaging in the following conduct, Respondents committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) On March 24, 2005, Respondents, by Attorney Tarik Johnson, at Respondents' facility, interrogated Respondents' employees about their union sympathies by conducting a poll.

(b) On two occasions on about April 21, 2005, Respondent Grenada Stamping and Assembly, Inc., by Human Resources Manager Chet Melton at Respondent Grenada Stamping's facility, told an employee that they could not discuss the Union at work.

7. By engaging in the following conduct, Respondents committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act:

(a) On March 24, 2005, Respondents, by Attorney Tarik Johnson, at Respondents' facility, interrogated Respondents' employees about their union sympathies by conducting a poll.

(b) Since about March 30, 2005, Respondent Grenada Stamping, notwithstanding the Union's March 24, 2005 request, has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

(c) Since about March 30, 2005, Respondent Grenada Stamping and Assembly, Inc. has failed and refused to furnish the Union with the necessary and relevant information the Union requested on March 24, 2005.

(d) About April 2005, Respondent Grenada Stamping and Assembly, Inc. took the following actions regarding the terms and conditions of employment of its unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to

this conduct and the effects of this conduct: (a) changed the health benefits by increasing the costs of certain prescription copayments, changing health insurance providers, and providing dental coverage; (b) implemented a 401(k) plan; (c) implemented a retirement incentive plan; (d) removed the Union's bulletin board from Respondents' facility; (e) changed the vacation year from a fiscal year beginning June 1 of each year to a calendar year; (f) changed employee vacation pay rates; and (g) continued to maintain an open door policy but no longer recognized the grievance procedure.

8. The unfair labor practices described above affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that Respondents must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Grenada Stamping and Assembly, Inc. unlawfully made changes in violation of Section 8(a)(1) and (5) of the Act, I recommend that Grenada Stamping and Assembly, Inc., at the request of the Union, restore the terms and conditions of employment which were in effect, and applicable to employees in the bargaining unit, before

Respondent Grenada Stamping and Assembly, Inc. unilaterally changed those terms and conditions beginning in April 2005, and make whole all unit employees for losses suffered as a result of the changes, as calculated in accordance with *Ogle Protection Service*, 138 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent Grenada Stamping and Assembly, Inc. unlawfully withdrew recognition from the Union, it shall be recommended that Respondent Grenada Stamping and Assembly, Inc. recognize and bargain collectively with the Union upon request, and embody any understanding reached into a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3028]

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[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

For the reasons set forth in *Caterair International*, 322 NLRB 64, (1996), an affirmative bargaining order is warranted as a remedy for Grenada Stamping and Assembly, Inc.'s unlawful withdrawal of recognition from the Union. An affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

(Continued on following page)

However, in *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000), the court held that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

I find that a balancing of the three factors warrants an affirmative bargaining order. (1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by Grenada Stamping and Assembly, Inc.'s withdrawal of recognition and its refusal to bargain with the Union. An affirmative bargaining order does not unduly prejudice the Sec. 7 rights of employees who may oppose continued union representation because its duration is only temporary.

Respondents engaged in unlawful conduct which undermined the Union's opportunity to bargain effectively. Since the Union was never given a truly fair opportunity to reach an accord with Grenada Stamping and Assembly, Inc., it is only by restoring the status quo ante and requiring Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy Grenada Stamping and Assembly, Inc.'s refusal to bargain with the Union because it would permit a decertification petition to be filed before

(Continued on following page)

ORDER

Each of Respondent Grenada Manufacturing, LLC and Respondent Grenada Stamping and Assembly, Inc., of Grenada, Mississippi, their officers, agents, successors, and assigns, as applicable shall

1. Cease and desist from

(a) Interrogating Respondents' employees about their union sympathies by conducting a poll.

(b) Telling employees that they can not discuss the Union at work.

(c) Notwithstanding the Union's request, failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

Grenada Stamping and Assembly, Inc. has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondents' other unfair labor practices were serious unilateral actions that were likely to have a continuing effect, thereby tainting employee disaffection from the Union arising during that period or immediately thereafter. These circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who might oppose continued union representation.

An affirmative bargaining order, with its temporary decertification bar for a reasonable period of time, is necessary to fully remedy Grenada Stamping and Assembly, Inc.'s unlawful refusal to bargain with the Union in this case.

(c) Failing and refusing to furnish the Union with the necessary and relevant information the Union requested.

(d) Changing the terms and conditions of employment of its unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) At the request of the Union, restore the terms and conditions of employment which were in effect, and applicable to employees in the bargaining unit, before Respondent Grenada Stamping and Assembly, Inc. unilaterally changed those terms and conditions beginning in April 2005, and make whole all unit employees for losses suffered as a result of the changes, as calculated in accordance with *Ogle Protection Service*, 138 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll

records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by Respondents at Respondents' Grenada, Mississippi facility, but excluding sales, purchasing, personnel department, office clerical and professional employees, guards and supervisors as defined in the Act.

(d) Furnish the necessary and relevant information requested by the Union on or about March 24, 2005.

(e) Within 14 days after service by the Region, post at its facility in Grenada, Mississippi, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director

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[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

for Region 26, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 24, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. June 12, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union sympathies by conducting a poll.

WE WILL NOT tell you that you can not discuss the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union at work.

WE WILL NOT fail and refuse to recognize and bargain, upon request, with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union as the exclusive collective-bargaining representative of our employees in the following unit:

All production and maintenance employees employed by us at Respondents' Grenada, Mississippi facility, but excluding sales, purchasing, personnel department, office clerical and professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to furnish the United Steel, Paper and Forestry, Rubber, Manufacturing,

Energy, Allied-Industrial, and Service Workers International Union with the necessary and relevant information it requests.

WE WILL NOT change your terms and conditions of employment, without prior notice to the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union and without affording it an opportunity to bargain with us with respect to this conduct and the effects of this conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL at the request of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union, restore the terms and conditions of employment which were in effect, and applicable to you, before we unilaterally changed those terms and conditions beginning in April 2005, and make whole all unit employees for losses suffered as a result of the changes.

WE WILL recognize and on request, bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union as the exclusive representative of unit employees with respect to wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

WE WILL furnish necessary and relevant information requested by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union.

GRENADA STAMPING AND ASSEMBLY, INC.
AND GRENADA MANUFACTURING, LLC

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(2)

No. 09-95

In the Supreme Court of the United States

GRENADA STAMPING AND ASSEMBLY INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's twenty-year-old case law requiring employers to give the incumbent union reasonable advance notice of an impending poll is rational and consistent with the National Labor Relations Act and relevant Supreme Court case law.

2. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner unlawfully polled its employees about their continued support for the Union when it failed to provide reasonable advance notice of the poll to the Union.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Allentown Mack Sales & Serv., Inc. v. *NLRB*, 522 U.S. 359 (1998) 3, 9, 10, 13, 14

Auciello Iron Works, Inc. v. *NLRB*, 517 U.S. 781 (1996) 2

Boaz Carpet Yarns, Inc., 280 N.L.R.B. 40 (1986) 7, 11

Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987) 2

Henry Bierce Co. v. *NLRB*, 23 F.3d 1101 (6th Cir. 1994) 3, 4, 10

Levitz Furniture Co. of the Pac., 333 N.L.R.B. 717 (2001) 9

Mingtree Restaurant, Inc. v. *NLRB*, 736 F.2d 1295 (9th Cir. 1984) 11

Patrick v. *Burget*, 486 U.S. 94 (1988) 12

Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967) 3, 6

Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) 12

Texas Petrochems. Corp., 296 N.L.R.B. 1057 (1989), enforced in relevant part, 923 F.2d 398 (5th Cir. 1991) 2, 3, 4, 5, 14

Texas Petrochems. Corp. v. *NLRB*, 923 F.2d 398 (5th Cir. 1991) 3, 4, 10

Cases—Continued: Page

Unifirst Corp., 346 N.L.R.B. 591 (2006) 7, 11
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 15
Wagon Wheel Bowl, Inc. v. *NLRB*, 47 F.3d 332 (9th Cir. 1995) 10
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982) 12

Constitution and statutes:

U.S. Const. Amend. I 9
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
29 U.S.C. 157 (§ 7) 2, 12
29 U.S.C. 158(a) 2
29 U.S.C. 158(a)(1) (§ 8(a)(1)) 6, 13
29 U.S.C. 158(a)(5) (§ 8(a)(5)) 2, 6, 13
29 U.S.C. 158(c) (§ 8(c)) 9
29 U.S.C. 159(a) 2
29 U.S.C. 160(e) (§ 10(e)) 12

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GRENADA STAMPING AND ASSEMBLY INC.,
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the *Federal Reporter* but is reprinted in 322 Fed. Appx. 404. The decision of the National Labor Relations Board (Pet. App. 13-150) is reported at 351 N.L.R.B. 1152.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2009. The petition for a writ of certiorari was filed on July 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (Act) guarantees that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. 159(a). It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," 29 U.S.C. 158(a)(5), or "to interfere with, restrain, or coerce employees in [their] exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 158(a), including "the right * * * to bargain collectively through representatives of their own choosing," 29 U.S.C. 157.

A union that has been "designated or selected for the purposes of collective bargaining by the majority of the employees," 29 U.S.C. 159(a), is usually entitled to a conclusive presumption of majority support for one year following certification and during the term of a collective bargaining agreement (up to three years), and a rebuttable presumption of majority support thereafter. *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785-786 (1996); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 38 (1987) (explaining that the presumption of majority status is based on a policy determination that it "promot[es] stability in collective-bargaining relationships, without impairing the free choice of employees") (citation omitted).

As the National Labor Relations Board (Board) has recognized, employers may have legitimate reasons to poll their employees to ascertain continuing support for the incumbent union when the presumption of majority status becomes rebuttable. See *Texas Petrochems. Corp.*, 296 N.L.R.B. 1057, 1061 (1989), enforced in rele-

vant part, 923 F.2d 398 (5th Cir. 1991) (*Texas Petrochems.*). At the same time, the Board "believes that employer polling is potentially 'disruptive' to established bargaining relationships and 'unsettling' to employees." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 364 (1998) (*Allentown Mack*) (quoting *Texas Petrochems.*, 296 N.L.R.B. at 1061). To balance these competing interests, the Board permits employer-sponsored polling but defines the circumstances (both substantive and procedural) under which an employer may conduct such a poll.

First, an employer can lawfully conduct a poll of its employees about their support for an incumbent union only if it has a good faith reasonable doubt (meaning uncertainty) as to the union's majority status. See *Allentown Mack*, 522 U.S. at 367, 380. Second, the employer must ensure that: (1) the purpose of the poll was to determine the truth of a union's claim of majority support; (2) that purpose was communicated to the employees; (3) assurances against reprisal were given; (4) the employees were polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1062-1063 (1967) (*Struksnes*). Third, employers must provide the union with advance notice of the time and place of the poll. *Texas Petrochems.*, 296 N.L.R.B. at 1064; *Henry Bierce Co.* v. *NLRB*, 23 F.3d 1101, 1108-1109 (6th Cir. 1994).

The advance notice requirement, the only requirement at issue here, has been in place since the early 1980s and was adopted by the Board in *Texas Petrochemicals*, 296 N.L.R.B. at 1063-1064. See *Texas Petrochems. Corp.* v. *NLRB*, 923 F.2d 398, 403 & n.7 (5th Cir. 1991) (explaining that the Fifth and Ninth Circuits

adopted an advance notice requirement in 1981 and 1984, respectively, and the Board referred to advance notice in 1982); see also *Henry Bierce Co.*, 23 F.3d at 1108-1109. Advance notice to an incumbent union is "critical" because the union "could be legitimately stripped of recognition as [the employees'] collective bargaining representative based on the results of such a poll," *Texas Petrochems.*, 296 N.L.R.B. at 1064; and it is particularly important when a successor employer, soon after taking over the business, seeks to poll its employees, *Texas Petrochems. Corp.*, 923 F.2d at 403. Providing such notice enables the union and the employer to present arguments for and against continued representation, and provides employees with the necessary tools to make a fully informed decision. *Ibid.* Advance notice also allows the union time to review the polling arrangements, designate an observer, be present when the votes are tallied, and "make certain that as many eligible voters as possible will have the opportunity to vote." *Texas Petrochems.*, 296 N.L.R.B. at 1074.

2. On March 10, 2005, petitioner acquired the assets of its predecessor, Grenada Manufacturing, LLC. Pet. App. 17; see *id.* at 13 n.3. At that time, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union (Union) represented the company's employees. *Id.* at 12, 16-17. The Union's contract had expired approximately one month earlier. *Id.* at 17.

On March 16 or 17, petitioner hired an attorney to poll the employees regarding their continued support for the Union. Pet. App. 69. Approximately one week later, at around 1:30 p.m. on the afternoon of March 23, petitioner met with Union officers (who were also employees) and informed them that there would be a poll held

the following morning at 7:00 a.m., approximately 18 hours later. *Id.* at 9, 70-75. When the officers objected, petitioner assured them that "[i]t's just a poll," there was nothing "to be concerned about," and "[i]t doesn't mean anything." *Id.* at 70-71, 76. Only after that meeting (*i.e.*, later on the afternoon of March 23) did petitioner post a notice informing employees of the poll scheduled for the following morning. *Id.* at 77-78. Given the timing, Union officers had no opportunity to discuss the poll with their co-workers before leaving work at the end of their shift, and no ability to seek legal advice from Union attorneys who were already leaving for the day. *Id.* at 74-77.

The result of the poll was 67 against union representation, and 46 for the Union. Pet. App. 87. Citing the poll as evidence of actual loss of majority support, petitioner withdrew recognition of the Union. *Id.* at 99. Thereafter, petitioner altered numerous terms and conditions of employment, including, *inter alia*, implementing a new Section 401(k) plan, health-care benefit plan, and retirement-incentive plan. *Id.* at 107-108.

3. Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging, among other things, that petitioner violated Section 8(a)(1) and (5) of the Act by conducting a poll of its employees and relying on that poll to support its withdrawal of recognition. Pet. App. 30-31. After a hearing, the administrative law judge (ALJ) held that petitioner committed unfair labor practices by conducting the poll without providing the Union with reasonable advance notice as required by *Texas Petrochemicals*, *supra*, and by failing to provide employees with assurances against reprisals and access to a secret ballot, and by creating a coercive atmosphere, all contrary to the

dictates of *Struksnes*, 165 N.L.R.B. at 1062-1063. Pet. App. 115-127.

The Board affirmed, adopting the ALJ's findings that the poll violated Section 8(a)(5) and (1) of the Act because petitioner failed to comply with the reasonable advance notice requirement, and Section 8(a)(1) because petitioner failed to poll employees by secret ballot. Pet. App. 13 & n.4, 22.

4. The Board petitioned for enforcement of its order. In an unpublished, *per curiam* opinion, the court of appeals granted the petition for enforcement on one ground: there was "substantial evidence in the record to support the conclusion of the ALJ, as affirmed by the [Board], that [petitioner] failed to give the Union reasonable advance notice of the poll." Pet. App. 7. The court of appeals accepted the Board's concession that petitioner had a "good faith basis" for polling its employees, and did not consider any other grounds urged for affirmance. *Id.* at 6-7.

At the outset, the court of appeals acknowledged polling as "an important tool" to help employers "gauge a union's majority support" and "avoid liability for bargaining with a union that does not in fact enjoy majority support." Pet. App. 5. Expressly limiting its opinion to "the discrete facts of this case" (*id.* at 10-11), the court of appeals held that notifying the Union "mid-afternoon on the day before the 7:00 a.m. commencement of voting," when an attorney was retained and the poll planned "no less than a full week prior," left "no serious question that the notice was not furnished a reasonable time in advance." *Id.* at 11. This "scant 18 hour[]" notice made it "virtually impossible" for the Union "to seek legal guidance, communicate with the employees, or arrange for the presence of observers or third-party ad-

ministrators before the poll became a fait accompli." *Id.* at 7-8. Petitioner's failure to give reasonable notice eliminated "any chance that the Union might otherwise have had to contact its members or take steps to ensure that the poll would be conducted in compliance with the [other procedural] requirements * * * and in such a manner as not to constitute an unfair labor practice." *Id.* at 11. That was particularly troublesome, the court explained, because petitioner was a successor employer seeking to poll its employees shortly after taking over. *Id.* at 10. The court of appeals concluded that the policy behind requiring advance notice—"allowing a union time to have contact with the employees and to disseminate information"—was "certainly not furthered by the very short time in which to act that [petitioner] afforded the Union." *Ibid.*

The court rejected petitioner's contention that two prior Board cases (decided approximately twenty years apart) compelled a different outcome or required a remand for the Board to reconcile its precedents. Pet. App. 8-9. The court found both decisions distinguishable on their facts. In *Unifirst Corp.*, 346 N.L.R.B. 591 (2006) (*Unifirst*), unlike the instant case, the union was informed of the poll a "few days" before, and employees were informed at a company-wide meeting several days in advance. Pet. App. 8. In *Boaz Carpet Yarns, Inc.*, 280 N.L.R.B. 40 (1986) (*Boaz Carpet*), the Board found one-day advance notice to be sufficient where (unlike here) the union had been aware of the employees' dissatisfaction for an entire month (a substantial majority of employees had signed a petition) and where the employ-

ees received three days advance notice. Pet. App. 8-9.[1] Although petitioner argued that the same knowledge could be imputed here, because the good faith basis to question majority support was undisputed, the court refused to "eviscerate the advance-notice requirement by equating the belief that an employer must hold before conducting a poll with notice to the union." *Id.* at 9 n.19. Finding "no viable argument in support of [petitioner's] contention that its notice to the Union was reasonable" under these circumstances, the court of appeals granted the Board's petition for enforcement. *Id.* at 7-8.

ARGUMENT

The court of appeals decision does not conflict with any decision of this Court or any other court of appeals. The Board has required employers to provide reasonable advance notice to incumbent unions in these circumstances for two decades with court approval and without significant controversy. The court of appeals' unpublished, *per curiam* decision was case- and fact-specific, holding only that substantial evidence supported the ALJ's finding that 18 hours "advance" notice of polling under circumstances where the Union had no opportunity to react did not qualify as reasonable advance notice. That holding was correct and does not implicate any of the larger policy issues raised in the petition. The question of what qualifies as "reasonable" notice is rarely litigated (at the Board or the court of appeals level), and this Court's intervention is not warranted.

1. Contrary to petitioner's contentions (Pet. 7), this case presents no important question concerning legal

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[1] The court also questioned whether *Boaz Carpet* remained good law, given that it pre-dated *Texas Petrochemicals*—the Board's "first clear statement" of the advance notice requirement. Pet. App. 9 n.18.

requirements governing polling under the Act. It would not afford this Court an opportunity to decide questions purportedly left open by *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359 (1998). Pet. 7, 16-17. Nor does this case, as petitioner asserts (Pet. 18-20), provide a vehicle for this Court to examine the Board's polling policies under the First Amendment or Section 8(c) of the Act. There is also no occasion to do so. Petitioner points to no court of appeals decision, including the decision below, that has considered the question of whether procedural safeguards applied by the Board to employer-sponsored formal polls of the kind at issue in this case raises issues under Section 8(c) of the Act, 29 U.S.C. 158(c), or the First Amendment.

Petitioner's invocation (Pet. 7-10, 23) of the Board's decision in *Levitz Furniture of the Pacific, Inc.*, 333 N.L.R.B. 717 (2001) (*Levitz*), which changed the substantive standard for employer withdrawal of recognition (not polling), is equally unavailing. This case has nothing to do with the continuing validity of the "good-faith reasonable doubt," *Allentown Mack*, 522 U.S. at 380, standard for polling. All parties agree that petitioner had a good faith basis to poll here, and the court of appeals' decision rested on that premise. Pet. App. 6-7. This case is thus an inappropriate vehicle to address any such broader issues.[2]

The sole ground on which the court of appeals found petitioner's poll to be unlawful was its failure to give the

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[2] In any case, that issue is not sufficiently developed for this Court's review. In *Levitz*, the Board left for "a later case whether the current good-faith doubt (uncertainty) standard for polling should be changed." 333 N.L.R.B. at 723. Until the Board decides that issue, and its decision has been subjected to review in the courts of appeals—neither of which has occurred—review by this Court is especially unwarranted.

Union reasonable advance notice of the time and place of the poll. That entirely reasonable procedural requirement for employer-sponsored polling has engendered minimal litigation and has produced no circuit conflict. This case is not a proper vehicle to resolve the broader array of procedures and policies that predominate the petition, but that played no part in the decision below.

2. a. The only procedural safeguard at issue is the requirement that an employer give the incumbent union advance notice of the time and place of a scheduled poll. As petitioner concedes (Pet. 10), that has been the Board's rule for two decades. See pp. 3-4, *supra*. During this time only two courts of appeals have directly addressed the propriety of this requirement—both with express approval. In *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 403 (1991), the Fifth Circuit recognized the benefits of providing advance notice and enforced the Board's decision finding that a poll conducted without advance notice constituted an unfair labor practice. The Sixth Circuit likewise agreed that a poll of employees concerning their support for the incumbent union should be held unlawful when the employer fails to provide reasonable advance notice. *Henry Bierce Co.* v. *NLRB*, 23 F.3d 1101, 1108-1109 (1994) (holding that because the employer "did not give advance 'time and place' notice to the union * * * its poll therefore constituted an unfair labor practice"); see *Allentown Mack*, 522 U.S. at 383 (Rehnquist, C.J., concurring in part and dissenting in part) (recognizing Board's "additional requirement of advance notice of the time and place of the poll"); *Wagon Wheel Bowl, Inc.* v. *NLRB*, 47 F.3d 332, 335 (9th Cir. 1995) (recognizing that employer can poll its employees "if it has given the union notice of the time and place of

the poll") (quoting *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295, 1299 (9th Cir. 1984)).

In the absence of any circuit conflict, petitioner asserts (Pet. 10) that "the Board has rendered a variety of inconsistent and irreconcilable decisions on this topic" which "demonstrate that the Board's policy regarding advance notice of polling is irrational." The "variety" of purported "inconsistent and irreconcilable decisions" consists of three cases (including the decision below) over the course of two decades. All three embrace an advance notice requirement and thus cast no doubt on the policy underlying the requirement itself. To the extent petitioner is instead arguing that the Board has been inconsistent in determining what qualifies as "reasonable" advance notice, and what does not, this Court's review is not warranted on that subsidiary detail.

As the court of appeals held, the other two Board decisions—*Unifirst Corp.*, 346 N.L.R.B. 591 (2006), and *Boaz Carpet Yarns, Inc.*, 280 N.L.R.B. 40 (1986)—are distinguishable on their facts. In *Unifirst*, the employer sent notice to the union four days prior to the scheduled poll, and held a meeting for all employees the following day (three days before the poll). 346 N.L.R.B. at 606. The ALJ found this to be sufficient advance notice. *Id.* at 607. In *Boaz Carpet*, a case predating *Texas Petrochemicals*, the union had notice of employees' dissatisfaction one month before the poll and, while the union received notice of the poll only one day prior, employees were informed three days in advance through a posting at the facility. 280 N.L.R.B. at 44-45. The Board held that "under the circumstances" the Union was "on notice generally" well in advance of the poll. *Id.* at 45.

In contrast, petitioner (a recent successor) provided the Union only 18 hours notice at a time of day (shortly

before the end of the shift) when an effective response was virtually impossible and with false assurances suggesting an expedited call to action was unnecessary. These distinctions do not violate the duty of "reasoned decisionmaking," see Pet. 12, nor does this rarely litigated issue warrant this Court's attention.

b. Petitioner also claims (Pet. 15-16) that the Act does not "sanction[]" invalidating a poll on the basis of an inadequate, one-day notice without an independent showing that the lack of notice restrained or coerced an employee's exercise of his or her Section 7 rights or that invalidation would protect such rights.

This argument is not properly before the Court. Petitioner failed to raise it before the Board and is now jurisdictionally barred from doing so. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has enforced that provision strictly, holding that Section 10(e) is jurisdictional and that the failure to present an issue to the Board precludes subsequent judicial consideration of that issue. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982). In addition, petitioner did not raise this argument before the court of appeals, and the court did not decide it. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992) (Court ordinarily will not consider issues neither raised nor resolved by the court of appeals.); *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988) (Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court.").

Even if this Court could reach the issue, petitioner's argument provides no basis for review. Section 8(a)(5) of the Act gives the Board authority to proscribe conduct by an employer that constitutes a "refus[al] to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Section 8(a)(1), 29 U.S.C. 158(a)(1), likewise confers authority on the Board to adopt procedural safeguards for the manner in which an employer may poll its employees about their continued support for a union. Even Chief Justice Rehnquist's concurring and dissenting opinion for four Justices in *Allentown Mack*, which questioned the Board's authority to regulate polling through a substantive standard, recognized and accepted its authority to impose procedural safeguards, including advance notice, to protect employee rights. See 522 U.S. at 383 (Rehnquist, C.J., concurring in part and dissenting in part) (explaining that the "requirement of advance notice of the time and place of the poll * * * make[s] coercion or restraint of employees highly unlikely"). Petitioner points to no court that has held otherwise.

c. Equally unavailing is petitioner's assertion (Pet. 16-17)—also raised neither to the Board nor to the court of appeals—that the Board's polling policy conflicts with this Court's precedent by emphasizing stability in collective-bargaining relationships and failing to "factor the principles of employee free choice or majority representation into its analysis of polling." For the reasons stated above (p. 12, *supra*), the Court is barred from considering that argument.

It is also unclear whether petitioner's argument is aimed at the Board's reasonable advance notice requirement specifically, or at the Board's polling policies more generally. The latter are not at issue in this case. See

pp. 8-10, *supra*. And the former argument is without merit. In *Allentown Mack*, this Court recognized that the Board had "chosen to limit severely the circumstances under which [employer-sponsored polling] may be conducted" based on its belief "that employer polling is potentially 'disruptive' to established bargaining relationships and 'unsettling' to employees." 522 U.S. at 364-365 (quoting *Texas Petrochems. Corp.*, 296 N.L.R.B. 1057, 1061 (1989), enforced in relevant part, 923 F.2d 398 (5th Cir. 1991)); see *Texas Petrochems.*, 296 N.L.R.B. at 1061-1062 (explaining that by "reasonably limiting the range of circumstances under which an employer may lawfully conduct such polls, the potential for disruption of collective-bargaining relationships is limited, without unreasonably impairing * * * the employees' right freely to choose whether or not to be represented"). And Chief Justice Rehnquist's concurring and dissenting opinion in *Allentown Mack* expressed the view that "[a] poll *conducted in accord with the Board's substantial procedural safeguards*," including "advance notice of the time and place of the poll," "would not coerce employees in the exercise of their rights." 522 U.S. at 383 (Rehnquist, C.J., concurring in part and dissenting in part) (emphasis added). Petitioner proffers no substantial reason why simply requiring advance notice (as the Board has done for two decades) would unduly infringe on employee free choice or majority rule.

3. Finally, petitioner contends (Pet. 21-22) that the court of appeals erred in holding that substantial evidence supports the Board's factual findings. As this Court has explained:

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the

> Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 491 (1951).

The court of appeals did not "misapprehend" or "grossly misappl[y]" the substantial evidence standard. Rather, the court reasonably found "no viable argument" to support petitioner's contention that the 18 hour notice was reasonable, where the "scant" notice made it "virtually impossible for the Union to seek legal guidance, communicate with its employees, or arrange for the presence of observers or third party administrators before the poll became a fait accompli." Pet. App. 7-8. This decision was correct, and there is no reason to review the court's substantial evidence determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2009